SUPREME COURT, U. S.

UNITED STATES SUPREME COURT

APPENDIX

DECISIONS TO BE REVIEWED

Supreme Court, U.S.
FILED
SEP 3 1971
E. ROBERT SEAVER, CLERK

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STATE OF LOUISIANA, THROUGH
THE DEPARTMENT OF HIGHWAYS,
Plaintiff

vs.

CHARLES A. PATOUT ET AL.
Defendants

71 - 342

CONSOLIDATED NO. _____

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STATE OF LOUISIANA THROUGH
THE DEPARTMENT OF HIGHWAYS,
Plaintiff

vs.

VERMILION DEVELOPMENT CO., INC.
Defendant

* * * * * * * * * * *

PETITION FOR WRIT OF CERTIORARI TO
REVIEW FINAL DECISIONS OF THE
LOUISIANA STATE SUPREME COURT

* * * * * * * * * * *

ATTORNEYS:

Norman L. Sisson
Robert J. Jones
Chester E. Martin

P. O. Box 44245
Capitol Station
Baton Rouge, La. 70804

Tuesday May 4, 1971

SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA, THROUGH
THE DEPARTMENT OF HIGHWAYS

Vs. No. 50615

VERMILION DEVELOPMENT COMPANY, INC.

STATE OF LOUISIANA, THROUGH
THE DEPARTMENT OF HIGHWAYS

Vs.
Vs. No. 50617

CHARLES A. PATOUT et al.

On Writ of Certiorari, or Review, to the Court of Appeal, Third Circuit, Parish of Lafayette, Louisiana.

DIXON, Justice

(Tate, J., recused, having participated in Court of Appeal decision.)

The State Department of Highways expropriated various tracts of land belonging to defendants. The defendants are a corporation and the three individuals who owned the stock in the corporation. Two of these individuals operated as a partnership in developing real estate. The third managed the development corporation for the other two. The land involved in the expropriation all lies within newly developed residential subdivision property, or within tracts adjacent to the developed residential subdivision, which adjacent tracts were in various stages of development.

Three suits were filed to expropriate land lying within a proposed extension of Interstate 10 at Lafayette. One was compromised. The other two were consolidated for trial.

The substance of the litigation before us is the compensation to be paid by the State to landowners who acquire land and develop it in an area reasonably believed to lie within the extension of an existing highway right of way which ends nearby. It is the State's contention that the defendants in these cases bought and developed land in "bad faith," knowing that the land was soon to be expropriated and hoping thereby to profit at the expense of the State. The State contends that the defendants are entitled to something less than market value of such property on the thing less than market value of such property at the time of the expropriation.

The defendants deny any "bad faith" and insist that they are entitled to market value of the property on the date of the expropriation.

The case was tried for ten days. The trial judge stated in his written opinion that the State "has set forth a statement of facts which counsel for defendant has concurred in; "the trial judge then incorporated the agreed statement of facts in his opinion; this portion of the trial judge's opinion was accepted by the Court of Appeal and incorporated in its opinion. Since these facts are not contradicted before us, we will attach them as an appendix to this opinion.

Vermilion Development Company, Inc. is the defendant in suit numbered 33,209 in the district court. The tracts taken were referred to in the petition as two tracts on which five houses were built. The property was actually five lots in Richter Park Subdivision, Extension No. 2. $115,350.00 was deposited when the suit was filed on November 18, 1964. On December 15, 1964 the answer was filed; on December 28, 1964 a joint motion of the State and the defendant was presented and signed on the same day by the judge, allowing the defendant to withdraw the deposit.

On April 14, 1965 the State filed an amended petition, in which it alleged:

"4. That after the filing of the original petition herein, plaintiff obtained the information that at the time defendant acquired the land expropriated herein, its officers, Charles A. Patout, Lawrence C. Richard and Eugene W. Patout had full knowledge of the location of the proposed highway right of way and that with full knowledge that the land would be required for the construction of the proposed highway improvement, they constructed within the required right of way five brick veneer one and one-half. story houses.

"5. That therefore the just compensation to which the said defendant is entitled is the reimbursementt for the land which it purchased within the required right of way and the salvage value of the houses, constructed by the defendant upon the land.

"6. That the Department of Highways gave public notice of its plan to construct the highway, for the construction of which defendant's property was expropriated herein, by public hearing on October 9, 1959 and continuously thereafter.

"7. That under the provisions of Louisiana Civil Code, Article 2633, defendant is not entitled to receive more for the property expropriated than its value at the time public notice of the construction of the highway was given, and to pay more would constitute unjust enrichment to defendant at public expense.

"8. That the defendant acquired the land expropriated herein, through its officers, from Albert A. Richter under act of sale dated January 29, 1963, recorded in book Z-38, p. 437, and by act of sale dated February 1, 1963, recorded in book G-39, p. 101, of the conveyance records of

the Parish of Lafayette, State of Louisiana,

"9. That the consideration paid to Albert A. Richter by defendant and its officers was at the rate of $2,000.00 per acre, and the amount of land was 1.012 acres, and the total paid for the land was $2,024.00.

"10. That the plaintiff sold the aforesaid five houses at public sale to the highest bidder and received for them the amount of $16,050.00

"11. That therefore the just compensation to which the defendant is entitled, being the amount paid by the defendant, through its officers, for the expropriated land, and the amount the houses brought as salvage, is $18,074.00, as is shown by the amended Certificate of Estimate of Just Compensation marked 'Exhibit P-5-A,' annexed hereto and made a part hereof."

The State then prayed for judgment ordering the defendant to refund $97,276.00.

The trial judge concluded that the evidence failed to show that the defendants in the suits knew the exact location of the extension of I-10. He found that the developers had not acted in "bad faith." The district judge said:

"From the communications that have been referred to, it seems that these people did what they could to ascertain its whereabouts so as to protect themselves. Immediately upon being told or warned about the construction, they ceased operations in that respect and moved on into other areas of the subdivision. I do not believe their overall conduct depicts a scheme with the ultimate purpose of enriching themselves at the public expense. Therefore, the first issue presented to the Court in this litigation, i.e. the denial of compensation on the basis of unjust enrichment will be denied. The evidence is not

clear and convincing and to a legal certainty that these persons were guilty of bad faith as alleged."

The Court of Appeal was impressed with evidence which indicated that the developers were able to accurately predict in 1961 where I-10 would pass after the expropriation in 1964, and had bought on June 29, 1963 (under a development contract with one Richter which gave the developers the right to acquire additional land adjacent to the development for the price of $2,000.00 an acre) sixty-one lots which either lay within the new right of way or were partially affected by the right of way. The Court of Appeal also pointed out that construction was begun on the new houses lying within the expropriated property in March or April of 1964, and that some work was done on the houses at night and in rainy weather. These houses were two-story houses and more expensive than others in the subdivision.

We are convinced that the interpretation of the testimony by the trial court is more nearly correct than the conclusions drawn by the Court of Appeal. There was no evidence adduced from which we could say that the developers had actual knowledge that I-10 would be extended through their subdivision. The acquisition of lots (later found to be within the right of way) by exercising their rights under the development contract, was a natural and normal extension of a plan of development planned and plotted years before.

The newly acquired lots were adjacent to land already owned by the developers; some of them lay on partially improved streets; all the land acquired at this time was treated by the vendors and vendees as if it had already been subdivided, and appears on plats in evidence as lots in Richter Park, Extension No. 2. There is evidence in the record that the construction of two-story houses was timely and met an actual demand that existed in the market. The construction of the houses taken in this suit was not the only con-

struction engaged in by the defendant corporation; the managing director of the development corporation, having suffered a heart attack, commenced in 1964 an extensive building program throughout the subdivision, because there was an actual need by the corporation for houses to sell.

The two-story houses were located by the developers in a place apart from smaller houses already constructed, and near lots with large trees. (The sixty-one lots acquired from Richter included a wooded area described by the developers as choice lots).

The evidence reflects that the developers advertised the houses involved aggressively before they were notified by the highway department of the impending expropriation. The houses themselves, having been sold by the State after the expropriation, were moved to other locations, and had been sold to home buyers before the trial. The houses, although larger than others previously constructed in the neighborhood, were not of expensive design and construction.

The Court of Appeal disagreed that a letter received from the highway department in 1961 justified the developers' belief that the highway department intended no further expropriation within the subdivision. The Court of Appeal interpreted the department's letter as being restricted to a statement that the department would not take any other right of way for the "proposed Lafayette Intersection." Suffice it to say that on the maps attached to the petitions for expropriation in these cases, the project is numbered, but is named in prominent lettering "Lafayette-Intersection La 3052 Interstate Highway."

Whatever "bad faith" is, we agree with the trial court that it has not been established in this case, and that the response of the developers to the situation created by the department of highways was neither unreasonable, fraudulent nor predatory. The "bad faith" plea of the State is analogous to an allegation of fraud, the burden of proving which lies, of course, "on him who alleges it." C.C. 1848.

The Court of Appeal announces as the rule of law:

> "A landowner who buys land or makes improvements within an area he knows will be required for a public improvement is entitled to be compensated for the land at an amount no greater than he paid and to be compensated for the improvement at an amount no greater than the salvage value of the improvements. State Through Dept. of Highways v. Laird, 219 La. 567, 53 So. 2d 674, 676 (1951); 29A, C.J.S. Eminent Domain § 175(1), p. 748; Eminent Domain § 294, 27 Am. Jur. 2d 105, 6." State Through Department of Highways v. Patout et al., 236 So.2d 40, 48.

It is difficult to visualize how the rule announced by the Court of Appeal could have applied in Louisiana in an expropriation under the "quick taking" statute. Conceivably, it might apply if it were proved that the landowner, by surreptitious means, penetrated the curtain of secrecy which surrounds decisions made in the State Department of Highways and obtained advance information concerning the final location of a highway improvement. Such a situation could only arise in cases akin to the fraudulent acquisition of information. Such is not the case before us. Such was not the case in State v. Laird, 219 La. 567, 53 So.2d 674. Such was not the case in the encyclopedias cited, nor in the cases cited in the encyclopedias.[1]

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[1] We do not cite the encyclopedias as authority, but it should noted that the text referred to at 27 Am.Jur. 2d 105 is as follows:

"As a general rule, knowledge of the fact that a public improvement is proposed which will result in the taking of his land does not deprive an owner from recovering the value of buildings subsequently erected, since even though preliminary steps have been taken, the making of the contemplated improvement may be abandoned, and it would be highly unjust to deprive an

State v. Laird was an expropration suit commenced before the passage of Act 235 of 1948, the first "quick taking" statute. The suit was filed and a jury of freeholders was empaneled. During the pendency of the suit the tract from which a portion was taken by the State was conveyed from Laird to Habert. Habert constructed a garage and a bridge during the pendency of the expropriation roceedings. The Supreme Court denied recovery for these items, saying that the knowledge of the expropriation together with the warning given him by the highway department when he began to construct the new garage "certainly bars recovery for removing and reconstructing the same and for rebuilding his driveway." 53 So.2d 674, 676. The Laird case is clearly inapplicable to the facts before us. No one contends the defendants here improved the land after the taking.

State v. Landry, 219 La. 721, 53 So.2d 908, was decided by the Supreme Court on the same day it decided State v. Laird. In the Landry case, also, there had been an expropriation suit commenced in 1947. The State delayed the trial, and ultimately dismissed the original suit, filing another proceeding in February of 1949. Squarely before the court was the question of whether the land should be valued at the time the first suit was filed, or the time of the filing of the second suit. The Supreme Court said at 53 So.2d 910:

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owner of the right to make in good faith the best use of his property except at his peril. A statute denying compensation for any building erected on land after filing a map of a proposed street across it, although proceedings to open the street or condemn the land have not been begun and perhaps never will be, is unconstitutional as depriving the owner of property without just compensation. Where, however, a building is erected or moved upon land which the owner knows is to be taken by eminent domain, and is placed upon such land in bad faith, with the sole purpose of enhancing the damages and not in the natural, ordinary, and legitimate use of such property, the building remains personal property and should not be considered in determining the value of the real estate. And clearly landowners

"The rule is well settled that the measure of value of property expropriated for public use is the market value of the property at the date of the institution of the expropriation suit. . . . .Of necessity, therefore, the value of the land at the time of the filing of the second suit will control."

The expropriation before us was commenced under the authority of R.S. 48:441, et seq. The source of these provisions is Act 107 of 1954. There is no other legislative authority that fits the procedure followed by the State. The measure of compensation set out in Act 107 of 1954 and R.S. 48:453 is as follows:

"'The market value is determined as in general expropriation suits but as of the time the estimated compensation was deposited in the registry of the court.

"Damage to the remainder of the property is determined as of the date of the trial.

"In either case the defendant has the burden of proving his claim."

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cannot recover in condemnation proceedings for improvements to the property begun by them after the condemnation proceedings were actually begun."

The text at 29A C.J.S. 748 is as follows:

"While one may in good faith purchase or improve land regardless of any probability of a subsequent appropriation for public purposes, no compensation can be recovered for improvements placed on the land for the sole purpose of enhancing the damages to be recovered on a subsequent condemnation. Generally speaking, a landowner is not entitled to compensation for improvements placed on land after it is appropriated to a public use, but the particular point of time at which the land may be said to be appropriated within this rule varies in the different jurisdictions.

The reliance by the department of highways on Civil Code article 2633[2] is misplaced. Although C.C. 2633 is duplicated in R.S. 19:9, the provisions in R.S. 19:1, et seq. are not followed by the highway department in expropriation cases; R.S. 19:1, et seq. do not provide for appraisal of the property before the filing of the suit, and do not provide for the change of ownership until after appraisal by court appointed appraisers and payment of damages to the owner.

Whatever the standard, statutory or jurisprudential, it must comply with the requirements of the Constitution of the State of Louisiana. Article 1 § 2 provides:

> "Except as otherwise provided in this Constitution, private property shall not be taken or damaged except for public purposes and after just and adequate compensation is paid." (Emphasis added).

"There is authority for the view that as long as the owner acts in good faith and in an ordinarily prudent manner he should not be deprived of the value of reasonable improvements on his realty even though they were made after the commencement of a condemnation proceeding for the appropriation of such realty. However, under a statute so providing, no improvements put upon property subsequent to the service of a summons in an eminent domain proceeding instituted for the purpose of appropriating such property shall be included in the assessment of compensation or damage for the taking.

"If an improvement is commenced before the institution of condemnation proceedings, the owner is entitled to compensation therefor, although it is not completed until afterward. Improvements made on land subsequent to, and in reliance on, a decision of public authorities not to condemn such land may be recovered on its subsequent condemnation.

"Constitutionality of statutes. Particular statutes denying compensation for improvements erected subsequent to a specified point of time have been held unconstitutional, although other statutes have been upheld."

[2] "In estimating the value of the property to be expropriated,

Article 4 15 provides:

> "No ex-post facto law, nor any law impairing the obligation of contracts, shall be passed; nor shall vested rights be divested, unless for purposes of public utility, and for just and adequate compensation previously paid." (Emphasis added).

Consequently, the measure of compensation for the taking of the houses is their market value at the time of taking, and not the "salvage value" as found by the Court of Appeal.

As for the lots which were conveyed from Richter to the developers of the subdivision, the State's contention is that it should pay only what the developers paid (at the rate of $2,000.00 per acre) instead of the market value of the lots at the time of the expropriation. Why the State should be allowed to profit from the contractual arrangements of the developers has not been demonstrated. The market value of the lots would, it seems, be the same, whether they were owned by Richter or any combination of the defendants. Their market value was not increased by their purchase by the developers. It would be grossly unfair to restrict the recovery for this land to the price fixed in a development contract made many years before, when the value of the land had increased due to the passage of time and the industry of the developers.

In addition to the disagreements arising from the purchase of lots lying within the proposed right of way, and the construction of five houses commenced just prior to the expropriation, the State complains of an award to the developers for severance damages

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the basis of assessment shall be the true value which the land possessed before the contemplated improvement was proposed, and without deduction therefrom any amount for the benefit derived by the owner from the contemplated improvement or work."

to land owned by Richter. In 1958 there were contracts executed between Charles A. Patout and Lawrence C. Richard, as "agents," and Albert A. Richter and Robert H. Richter. In these two contracts, Patout and Richard obligated themselves to develop the Richter land into subdivision property. The Richters obligated themselves to furnish land as needed by the developers. The developers incurred specific obligations in a development program, including keeping the street development "sufficiently ahead of development at least to the extent of 20 building lots." The price to be paid the Richters for the lots was fixed in the agreement at $2,000.00 per acre. The development of the subdivision was to be entirely under the control of and at the expense of Patout and Richard. Their interests and obligations under the contracts purported to be assignable and heritable.

The contracts provided that they would remain in full force "until all of said lots are sold," and would terminate automatically "when the last lot is sold."

Because the new highway separated Richter land, (as yet undeveloped, but included in the contract between the Richters and Patout and Richard) the developers claimed damages in their reconventional demand. Both the trial court and the Court of Appeal awarded the developers damages.

Some of the land expropriated was owned by Patout and Richard and was adjacent to the Richter land. These owners are not only entitled to recover fair and just compensation for the land taken; if their rights under the contract with the Richters constitute "property," Article 1 § 2 of the Constitution requires that the developers be compensated, for "private property shall not be taken or damaged except. . . .after just and adequate compensation is paid."

The State does not even argue that the rights of the developers under the contract with Richter did

not constitute property. (See Mongogna v. O'Dwyer, 204 La. 829, 16 So.2d 829). The evidence, as found by the trial court, clearly showed that the developers' rights under their contract suffered a serious diminution in value as a result of the taking. The analysis of the trial court, as affirmed by the Court of Appeal, was correct.

The State complains of an award for damages to a house under construction at the time of taking, but not expropriated. The house and lot lie north of the right of way taken, and were to have been isolated, unuseable and unsaleable, until the construction of an access road. The trial court accepted defendant's evidence and allowed $3,591.00 to the defendant. We find no error in this award, in which the Court of Appeal concurred.

In the district court the testimony of the two appraisers for the State and the two appraisers for the defendants was carefully analyzed. Various approaches to evaluating the newly constructed houses were explained by the appraisers. Defendant, engaged in building numerous houses, was unable to produce accurate records establishing the cost of each. The trial judge accepted the testimony of one of the State's appraisers, and fixed the value of the five houses and lots taken at a total of $124,550.00, with which conclusion we agree.

For the reasons expressed, the judgment of the Court of Appeal is reversed in part and set aside. There is now judgment reinstating the judgment of the trial court as follows:

It is ordered, adjudged and decreed that there be judgment herein in favor of defendant, Vermilion Development Company, Inc., and against the plaintiff, the State of Louisiana, through the Department of Highways, in the amount of $128,141.00, subject to a credit of $115,350.00, heretofore deposited into the registry of the court by the plaintiff and withdrawn

by the defendant by order of court, with legal interest thereon from date of judicial demand until paid, and all costs.

"The State of Louisiana, through the Department of Highways, under the authority conferred by Section 19.1 of Article VI of the Constitution of Louisiana, LSA, and the provisions of LSA-R.S. 48:441-460, filed suit for the purpose of expropriating property of defendants for highway purposes in the above captioned matters.

"The above suits were consolidated for trial and came on for hearing on the 21st day of June, 1965.

"It was stipulated by and between counsel that a public notice of a public hearing to be held in Lafayette, Louisiana was published in The Advertiser, a Lafayette newspaper, on September 10, 1959; further that the public hearing regarding the contemplated construction of I-10 through the Lafayette area was held in Lafayette, Louisiana on October 6, 1959.

"It was further stipulated that the salvage value of the 5 houses expropriated from Vermilion Development Company, Inc. was $17,760.00.

"The property owned by defendants and involved in this case is located partly in the Richter Park Subdivision of Lafayette Parish, Louisiana, and partly in in property located adjacent thereto and included in a proposed future extension of such subdivision. The property involved in Suit No. 33,209 is improved and the property involved in Suit No. 33,201 is unimproved. Plats of survey showing the properties involved in the taking are attached to both suits as Exhibit P-3.

Originally, A. A. Richter and Robert H. Richter owned a rectangular shaped tract of land containing 108.82 acres. They had a partition of this property with A. A. Richter taking the north one-half thereof and

Robert H. Richter taking the south one-half. Shortly thereafter, and on the same day, September 16, 1958, both Richters entered into separate but similar development contracts with Charles Patout and Lawrence Richard under the terms of which they obligated themselves to sell their land to such developers at the rate of $2,000.00 per acre in exchange for the development of such land into a residential subdivision.

"Contemporaneously with the above transaction, Richard, Charles Patout and his brother, Eugene Patout, created Vermilion Development Company, Inc., which corporation was owned by the three men in the proportions of one-third to each. The corporation was to purchase property from the developers as lots and build homes on them which it was to sell to the general public.

"The original plan was to develop the property covered by the development contracts in a prudent, orderly, and efficient manner. The first subdivision created on December 3, 1958 was called Richter Park Subdivision and consisted of a street running north and south called Richter Drive with building plots on either side having dimensions of approximately 60 feet fronting on said street by a depth of approximately 105 feet. Approximately in the center of Richter Drive was Julie Drive, which began on the west line of Richter Drive and extended westwards. Richter Drive above and below Julie Drive was called North and South Richter, respectively. The plan operated as expected and in due time the lots in the subdivision were sold to the corporation who constructed homes on such lots and sold them to the general public.

"In time, the need for additional lots arose and on September 11, 1959, Richter Park Subdivision, Extension No. 1 was created. Julie Drive was extended further westwards, and North and South Orleans Drive was created with lots on either side thereof similar in size and plan to that employed in the original Richter Park Subdivision. There was also created at this time,

Covington Drive and Hammond Road at the north and south ends thereof respectively.

"The same need for additional lots prompted the creation of Richter Park Subdivision, Extension No. 2 on February 22, 1962, with Julie Drive, Covington Drive and Hammond Road being extended still further westward and the creation of North and South May Drive as the main street of this extension. Lots size and shape were similar to the two preceding subdivisions.

"Subsequent thereto Albert A. Richter and Robert Richter sold to Charles A. Patout and Lawrence C. Richard all of the property owned by them and located south of the proposed extension of West Julie Drive up to the railroad right-of-way so that at the time of the taking said purchasers owned all of the property located south of West Julie Drive.

"During this period of time, Louisiana Highway No. 3052 (US 167) was created, being located just to the east of the Richter Park Subdivision complex. The interchange or intersection of this highway with the proposed Interstate Highway 10 was so located that the westerly leg thereof, having a right-of-way 300 feet in width, extended into the Richter Park Subdivision to a point located midway between North May and North Orleans Drive or on a line running north and south and located on the rear or back lot lines of lots facing North Orleans Drive and North May Drive.

"Properties owned by defendants herein and affected by such intersection was acquired from them by plaintiff by voluntary sales, copies of which are on file in these proceedings.

"On January 29, 1963, Charles A. Patout and Lawrence C. Richard purchased from A. A. Richter, 61 lots, 6 of which were located in the Richter Park Subdivision, Extension No. 2, and 55 of which were located in the undedicated and unimproved portion

of the Richter tract scheduled for eventual development as a residential subdivision. All of these lots, without any exception whatsoever, were located completely within or were partially affected by the right-of-way of Interstate 10.

"Counsel for the Department argues that the defendants acquired knowledge of the location of the right of way prior to the taking, and in anticipation of that taking acquired from the owner just that property located within the right-of-way and, therefore, were unjustly enriched at the public expense. Bad faith is contended in its effort to deny to defendants the compensation they seek, or the amount first deposited when this suit was filed.

"It is argued that the interchange or intersection of U. S. I-10 with La. State Highway 3052 (US 167) was located just east of the Richter Park Subdivision so the defendants realized that the price then being paid to landowners was good and they set about making plans to get as much money as they could when the State came to buy property for the Interstate continuation westward over and across this property. It is said in brief that defendants' maneuver was to gain the sympathy of this Court. Counsel argues further that a strip map of I-10 was supplied by the Department and was interlaid over a plat of the Subdivision enabling defendants to determine exactly where the highway would run. This was prior to 1964. Further, the Department asserts that the center line of the highway was established in March of 1959 by the placing of stakes which could be clearly seen by all viewers.

"The defendants asked the Department if it needed any further right-of-way as of August 5, 1961, but Counsel contends that this was 'to complete the position of innocence of themselves' and that the reply by the Department which read in part as follows: 'We do not contemplate the acquisition of any further right of way in your subdivision, for the proposed Lafayette Intersection,' made it clear that the intent was of the intersection only.

"Counsel then attacks the purchase by Patout and Richter of the 61 lots in 1963 as being an integral part of the scheme to unjustly enrich themselves at the public expense. They then knew, the Department says, that the highway was to occupy this identical area. The construction of the residential houses on 5 of these lots of a value above those in the general area is another indication of bad faith, suggests the Department. The construction of these houses commenced in March, 1964.

"The testimony of Albert A. Richter is referred to in support of the State's position and he is quoted to say that Mr. Patout told him he wanted to buy the lots to make money on the Highway Department. This Mr. Richter, it is noted, is the same Albert Richter who settled his case with the Department and then attempted to intervene in these suits, making substantially the same contentions as the Department.

"Defendants argue that they were guilty of none of the accusations made by the Department of Highways. They insist that they were acting in the normal and customary course of development in subdividing property for resale. They were, in fact, experienced men in the real estate business and had developed other subdivisions before. It is vehemently denied by Mr. Patout and all others concerned that they knew where the highway was to pass and schemed to unjustly enrich themselves by virtue of this knowledge.

"Counsel for defendants argues that the Department knew just where the highway was to be but took no affirmative steps to prevent the defendants from developing the land adversely to their interest. Mr. Louis Smith, employee of the Department of Highways, stated that he ran the center line of I-10 through the subdivision area and placed stakes every 100 feet some time in March of 1959 but permanent markers were only placed in the center of the railroad track to the west. He further stated that unless a person had access to field survey notes it would be difficult to

locate these permanent markers. Neither the defendants nor their engineers had access to this information.

"Mr. Frank Chachere, surveyor for the Highway Department, said that he saw about 2 blocks of the subdivision developed in 1959. He states that he sent this information to the Department.

"Mr. Henry McBride, a right-of way agent for the Department, stated that if construction is going on on the right-of-way it is usual to ask the owner to stop.

"Mr. Robert Bethea, Assistant Right-of-Way Agent for the Department, states that the vicinity maps available in 1959 did not show the exact location of the proposed rights-of-way. He went on to explain that where construction is going on in an area contemplated to be taken that they attempt to notify the owners not to incur additional expense. There can be some purchasing before the project is approved but only in cases of protective buying where construction is known to exist or to be commenced or in hardship cases to protect the individual."

"Mr. L. J. Lejeune, Review Appraiser for the Department, acknowledged that he had received a letter from Mr. Eugene Patout, President of Vermilion Development Company, requesting knowledge of the location of the right of way, and he had replied to the same. These letters are significant and are copied here in full.

"'August 5th, 1961

Mr. Lejeune
Louisiana Department of Hy.
Land Appraisal Department
Baton Rouge, Louisiana

"'RE: Richter Park Subdivision and
Richter Park Ex. #2
Lafayette, Louisiana

"'Dear Sir:

"'Due to contractual commitments on the above captioned subdivision(s), and work now being done not only by our corporation, but by the developers, Patout-Richard Agency, the time has come where it is imperative that we begin negotiations on any other right of ways that the state and/or state-federal projects might intersect the above captioned property.

"'We will suffer grave damages in our development of the property unless we can effect sale to you on any other property which you might need for your projects.

"'Relocation of water lines, sewer lines, etc., on our part, and the possible relocation of streets (now being paved) as well as existing drainage and engineering could cause us irreparable harm.

"'We have been advised by our attorneys to notify you immediately of the situation as it exists today, and to request that you submit for an amicable settlement for future ROWs as a necessary expedient so that damages to us will be minimized.

"'Please acknowledge this letter by early mail, as it is impossible for us to stop our operations upon the ASSUMPTION that Interstate No. 10 MIGHT intersect our development.

"'Yours very truly,

VERMILION DEVELOPMENT CO. INC.

BY: /s/ EUGENE W. PATOUT
Eugene W. Patout, President

EWP/c'"

"'August 17, 1961

F.A.P. I-10-2(12)101
STATE PROJECT 450-05-03
LAFAYETTE INTERSECTION
LA. 3052 INTERSTATE HWY.
LAFAYETTE PARISH

"'Mr. Eugene W. Patout
President
Vermilion Development Co., Inc.
122 N. Richter Drive
Lafayette, Louisiana

"'RE: RICHTER PARK SUBDIVISION &
RICHTER PARK EX. #2
LAFAYETTE, LOUISIANA

"'Dear Mr. Patout:

"'In reply to your letter - of August 5, 1961 - and also our telephone conversation this date, please be advised that I have discussed this matter with our Engineering Department and we do not contemplate the acquisition of any further right of way in your subdivision, for the proposed Lafayette Intersection. As far as can be determined, our Construction Plans are complete and we have - as of this date - acquired all right of way necessary for the construction of this project.

"'If we can be of any further assistance to you, please feel free to call upon us.

"'Yours very truly,

/s/ L. J. LEJEUNE
L. J. LEJEUNE
REVIEW APPRAISER

LJL/mep'"

"Having heard nothing from the Department subsequent to this communication, 5 homes on the 2 tracts involved in Suit No. 33,201 were begun in March and

April of 1964. Mr. Patout stated that they were constructed because he felt the market was such that this type home could be sold. In July of 1964 he was told by Mr. Maurice Chappuis, one of the appraisers for the Department, that the highway was to come through Richter Park. At this time the fifth home on these five lots was possibly 95% completed. Mr. Chappuis advised him that someone from the Highway Department would contact him and Mr. McBride later on did contact him. He thereupon discontinued all construction in the subdivision, and within the limits which he then understood the highway would encompass. After he received the July 24, 1964 letter from Mr. Cope, he states that he discontinued operations but immediately started new construction in a different area of the subdivision. These houses were in the price range of $20,000.00 and upward.

"The July 24 letter referred to above reads as follows:

"'July 24, 1964

STATE PROJECT NO. 450-04-03
F.A.P. NO. I-10-2(12)101
LAFAYETTE - INTERSECTION - La 3052 Highway
ROUTE I-10
LAFAYETTE PARISH

"'Vermilion Development Company, Inc.
100 North Richter Drive
Lafayette, Louisiana

"'ATTENTION: Mr. Eugene W. Patout,
President

"'Dear Mr. Patout:

"'As you have previously been advised by Mr. Henry H. McBride of our Lafayette District Office, the Department is contemplating the acquisition of property for the above captioned project in the near future. This

project will involve the construction of a portion of Route I-10 through Richter Park Subdivision within the confines of your ownership.

"'We are not concluding our survey of the area required from your ownership. Survey crews on the ground are taking topograph and this, when plotted, will complete the property map of Richter Park. We also have professional Real Estate Appraisers in the area developing the necessary data to finalize an appraisal of the area required from you.

"'It is anticipated that all data will be processed in sufficient time to permit us to begin formal negotiations about August 1, 1964. This, of course, is a tentative date assuming development of no unusual difficulties.

"'Inasmuch as the development of a complete survey map and appraisals of a highly developed area such as Richter Park is a very complex operation, we request that you delay construction of additional improvements within the required area until negotiations for the required area can be concluded. We will, of course, expedite our acquisition process as much as possible in this instance.

"'Your cooperation in this matter will be greatly appreciated. Should you desire any additional information in connection with this project, please do not hesitate to call on us.

"'Yours very truly,

"'/s/ GENE N. COPE
GENE N. COPE
SENIOR RIGHT OF WAY AGENT

GNC:sbz'

Tuesday May 4, 1971

SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA, THROUGH
THE DEPARTMENT OF HIGHWAYS

Vs.

No. 50614

CHARLES A. PATOUT et al.

STATE OF LOUISIANA, THROUGH
THE DEPARTMENT OF HIGHWAYS

Vs.

No. 50617

CHARLES A. PATOUT et al. and
VERMILION DEVELOPMENT COMPANY, INC.

On Writ of Certiorari, or Review, to the Court of Appeal,
Appeal, Third Circuit, Parish of Lafayette, Louisiana.

DIXON, Justice

(Tate, J., recused, having participated in Court of Appeal decision.)

This is a companion case to State v. Vermilion Development Company, Inc., No. 50615, decided this date. The land expropriated in this suit was divided by the State into sixteen separate parcels. Originally Albert A. Richter was included as a party defendant; his claim was settled.

The trial court carefully analyzed the testimony of the appraisers employed by the State and the defendants. The evidence is conclusive that the property was part of a planned subdivision which had

been under development for a period of six years before the expropriation. The development had been systematically performed, and all the evidence indicated that the remainder was suitable for subdivision development, and would in due course, as nearly as could be predicted, reach a state of complete development. Although some part of the land taken actually, at the time of taking, contained some growing crops, the trial court found that the transition into residential lots was "reasonably prospective, not speculative, so should be valued as subdivision property." The appraisal of one of the defendants' witnesses was accepted by the trial court.

The Court of Appeal accepted the findings of the trial court that the appraisal of Angers represented fair market value, with this exception: the Court of Appeal found that Angers based his "evaluation of the lots on the basis that all lots could be sold on the day of expropriation." Averting to the history of the development, and noting that the developers moved in an orderly fashion in extending streets and utilities, the Court of Appeal deduced that "a five to ten year delay would be expected for improving these undeveloped lots and placing them on the market." Consequently, Angers' appraisal for certain of the tracts was reduced in the Court of Appeal.

The State criticized Angers' method of appraisal. It is argued that property not lying on a completed street with the utilities at hand should be valued on an acreage basis as "potential subdivision development." Angers, on the other hand, used comparable sales to establish a front foot or square foot value of the lots which lay in various stages of development. He then computed the cost of converting the lots to fully developed subdivision property. These costs included necessary work to complete streets, drainage, sewage disposal and utilities. He then deducted the cost of such improvements from the value he had attributed to each lot.

Although there was a wide difference in the results reached by the two appraisers, we discern no basic difference in the appraisal methods. Each method was used in an attempt to determine market value. One method basically valued the land in the condition in which it was found at the time of the appraisal. The other valued the land as if it had been brought to readiness for its highest and best use and then subtracted the estimated cost of developing.

Angers himself recognized that there would be a substantial delay before the entire tract available to the developers was completed and sold. The existence of a market for the partially developed lots is a matter which an appraiser must consider in fixing market value. The imposition of a delay factor of from five to ten years by the Court of Appeal did not render Angers' evaluation more accurate.

There is no substantial error in the analysis of the appraisal evidence by the district court, and its judgment will be reinstated.

For these reasons, the judgment of the Court of Appeal is set aside, and it is ordered, adjudged and decreed that there be judgment herein in favor of the defendants, Charles A. Patout and Lawrence C. Richard, and against the plaintiff, the State of Louisiana, through the Department of Highways, in the amount of $137,178.00, subject to a credit of $58,800.00 heretofore withdrawn by the defendants, with legal interest from the date of judicial demand until paid, and all costs.

SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA, THROUGH
THE DEPARTMENT OF HIGHWAYS No. 50615

Vs.

VERMILION DEVELOPMENT COMPANY, INC.

STATE OF LOUISIANA, THROUGH
THE DEPARTMENT OF HIGHWAYS No. 50617

Vs.

CHARLES A. PATOUT et al.

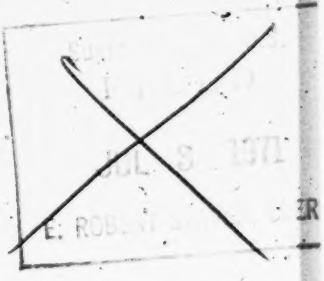
ON APPLICATION FOR REHEARING

Per Curiam

(Tate, J., recused)

The meaning of "legal interest" is questioned. The interest rate as provided in both R.S. 48:455 and La. Civil Code Article 1938 was 5% when these debts accrued (C. C. art. 1938 was amended in 1970). We do not decide which of these provisions now prevails for it is not at issue. Legal interest on this judgment is 5%.

UNITED STATES SUPREME COURT



* * * * * * * * * * *

STATE OF LOUISIANA, THROUGH
THE DEPARTMENT OF HIGHWAYS,
Plaintiff

vs.

CHARLES A. PATOUT ET AL.
Defendants

71-342

CONSOLIDATED NO. _____

* * * * * * * * * * *

STATE OF LOUISIANA, THROUGH
THE DEPARTMENT OF HIGHWAYS,
Plaintiff

vs.

VERMILION DEVELOPMENT CO., INC.
Defendant

* * * * * * * * * * *

STATE'S
PETITION FOR WRIT OF CERTIORARI TO REVIEW FINAL DECISIONS OF THE LOUISIANA STATE SUPREME COURT

* * * * * * * * * * *

ATTORNEYS:

Norman L. Sisson
Robert J. Jones
Chester E. Martin

P. O. Box 44245
Capitol Station
Baton Rouge, La. 70804

UNITED STATES SUPREME COURT

STATE OF LOUISIANA, THROUGH
THE DEPARTMENT OF HIGHWAYS,
Plaintiff

vs.

CHARLES A. PATOUT ET AL.
Defendants

CONSOLIDATED NO. _____

STATE OF LOUISIANA, THROUGH
THE DEPARTMENT OF HIGHWAYS,
Plaintiff

vs.

VERMILION DEVELOPMENT CO., INC.
Defendant

PETITION FOR WRIT OF CERTIORARI TO REVIEW FINAL DECISIONS OF THE LOUISIANA STATE SUPREME COURT

MAY IT PLEASE THE COURT:

The petition of the State of Louisiana, Through the Department of Highways, applying for writ of certiorari to review the final judgments of the Louisiana State Supreme Court rendered May 4, 1971, rehearing of which was refused June 28, 1971, in the consolidated cases, State of Louisiana, Through the Department of Highways, vs. Charles A. Patout et al., and State of Louisiana, Through the Department of Highways, vs. Vermilion Development Co., Inc., with respect, represents:

1(a): (1) The decision of the trial court (15th Judicial District Court, in and for the Parish of Lafayette, State of Louisiana) was rendered July 18, 1969, and is not included in any reporter system, but is set forth in full at pages 33-35 of the attached brief to the State Supreme Court; (2) the decisions of the Court of Appeal, Third Circuit, State of Louisiana, dated March 12, 1970, are reported at 236 So. (2d) 40 and 53 (1970), and are set forth in full at pages 86-119 of the above mentioned brief to the State Supreme Court, and (3) the decisions of the Louisiana State Supreme Court, dated May 4, 1971, with Per Curiam of June 28, 1971, accompanying refusal of rehearing, are appended hereto as reproductions of the original opinions.

1(b)i The final judgments of the Louisiana State Supreme Court to be reviewed are dated May 4, 1971, with a Per Curiam (not dated), of June 28, 1971, both of which dates are the dates of entry of the judgments, and are reported at 249 So. (2d) 167 and 179 (1971).

1(b)ii The application for rehearing was refused June 28, 1971.

1(b)iii The fact that 90% of the funds involved in an expropriation suit are paid by the Federal Government under the authority of 23 USCA § 101 et seq., from a Trust Fund created by tax upon fuel used in interstate commerce, is believed to confer on this Court the judisdiction to review an award to a landowner of the total value of five houses he constructed within what he knew was the proposed right of way for the construction of a segment of the National System of Interstate and Defense Highways (La I-10 Highway) in Louisiana, together with an award to the defendant of damages on land covered in a development contract but which land was not owned by him and which contract neither gave him the right nor the obligation to buy the land, together with an award some five times the amount he paid for the land purchased by him in anticipation that it would be acquired by the State for highway right of way, when such awards constitute unreasonable burdens upon the state and federal treasuries and unreasonably

hamper the accomplishment of the congressional policy and national intent to construct a System of National Defense Highways.

1(c): Questions presented for review:

1. The Substantial Federal Question: Decisions of the kind rendered by the State Supreme Court here places an unreasonable burden upon the federal and state treasuries and tend of defeat the congressional intent and purpose of establishing a National System of Interstate and Defense Highways, and tend to place an unreasonable burden upon interstate commerce in the waste of funds derived from taxation of fuel, used in interstate commerce, to create and replenish the Trust Fund established by the Congress for the construction of the System of Highways. The proliferation of such decisions as these, which can certainly be predicted and is now occurring, can defeat the purpose and intent of the various Federal Highway Acts adopted by the Congress.

2. May a State Court in fixing just compensation to be paid to a landowner, when the funds for the payment are almost exclusively from the Federal Government, make an award for five houses on the basis of reproduction cost when the record clearly shows that the landowner knew when he built the houses that he was building them within the right of way of the proposed highway construction which his engineer had located for him on the ground from the map obtained from the State, and which he had then purchased for the avowed purpose of "making a lot of money" from the State?

3. May a State Court in fixing just compensation, under the conditions recited in (1) above, make an award of damages to the defendant as an "owner" of land which he did not own, has no right or obligation to buy and, concededly, might never own?

4. May a State Court in fixing just compensation, under the conditions recited in (1) above, make an award

of approximately five times the amount paid by the owner, under the conditions outlined in (1) and (2) above?

The importance of these questions lies largely in the fact that the decisions here by the Louisiana State Supreme Court, has approved and will encourage sharp operators in the activities present here with the result that a substantial amount of federal and state funds will be wasted in benefitting the operators, which constitutes an unreasonable and unacceptable burden upon the national purpose to build a System of National Defense Highways, and an unreasonable burden upon the interstate commerce.

1(d) The governing law being construed and applied by the State Supreme Court consists of the following provisions of the Louisiana State Constitution of 1921.

(1) Article 1 § 2: "No person shall be deprived of life, liberty or property, except by due process of law. Except as otherwise provided in this Constitution, private property shall not be taken or damaged except for public purposes and after just and adequate compensation is paid." (Emphasis added.)

(2) The general provisions of 23 USCA 101, et seq.:

NOTE: The real problem is that of determining whether a landowner can scheme to increase the burden on the public's obligation to pay just compensation, and to determine what just compensation is when the scheme is attempted, when the funds are almost all derived from Federal Highway Trust Fund for the construction of the Interstate Highway System, where the decision to be reviewed is of such character as to place a crippling burden on the effort to carry out the policy of Congress of inducing states to engage in the construction and maintenance of a System of National Defense Highways, by the use of funds derived from taxation on fuels used in

interstate commerce.

1(e) The Department of Highways acquired certain property for the intersection interchange between the I-10 intersection with La-US 167 at Lafayette, Louisiana, from the defendants, during the course of which the defendants acquired the Department's map showing the projection of I-10 westerly from the intersection.

At approximately the same time that the public hearing had been held at which the plans for the construction of I-10 was made public, the defendants entered into a development agency contract with two landowners on a tract of land which had been owned by them in indivision but was then divided in kind between them.

The development contract with the northerly owner called for the defendants to develop the property for residential subdivision, paying all costs, with the landowner to join in all sales as vendor, accepting compensation for his land at $2,000 per acre.

This development plan progressed in a street by street fashion from its inception in 1958 to 1961, during which time the right of way needs for the interchange stub was acquired from the defendants on lots which they had purchased from the landowners, the brothers Richter.

Then, in 1961, the defendants had the proposed right of way west from the interchange projected by their engineer across the tract of land owned by the Richter brothers. The defendants then purchased the 61 lots which fell within the proposed right of way and, in 1964, all in a total departure from past practice and in no way in conformance to the development contract, they constructed five houses, in about a two-month period, in the $30,000 range of value. This was done at a time when the defendants knew that the right of way acquisition for the westerly extension across the Richter property was imminent.

The facts clearly show that the defendants bought the 61 lots and built the five houses with full knowledge that they were within the proposed right of way.

The trial court agreed with the State that "just compensation" would be a reimbursement of the defendants for their land purchase and salvage value for the houses, if the defendants engaged in the indicated activities in bad faith. The trial court then held that the defendants did not act in bad faith but really held that the defendants did not know that their activities were within the right of way.

On appeal by the State, the Court of Appeal made the following finding:

> "The Highway Department has established that the defendants knew with a high degree of certainty exactly where I-10 would be located at the time they exercised their right to purchase the land involved and when Vermilion Development constructed five houses on six of these lots. We are compelled to agree with the statement in the Highway Department's brief, that the construction of the five houses was 'quite obviously a final further effort to exact additional profit from the public's efforts to build highways.' We find that the defendants' purchase of the lots in question and the construction of the five houses was in bad faith and with the sole purpose of enhancing an award of damages to them. The trial court's determination to the contrary is manifestly erroneous.
>
> "A landowner who buys land or makes improvements within an area he knows will be required for a public improvement is entitled to be compensated for the land at an amount no greater than he paid and to be compensated

for the improvement at an amount no greater than the salvage value of the improvements. State v. Laird, 219 La. 567, 53 So.2d 674, 676 (1951); Eminent Domain, § 294, 27 Am. Jur. 2d 105, 6." 236 So. (2d) 40, 48 (1970) p. 100 of State Supreme Court brief by State.

Under this rule, the Court of Appeal fixed the just compensation for the houses at their salvage value but did not fix the award for the land at the reimbursement value as prescribed by its rule and thus the State sought writ of review to the Supreme Court, as did the defendants.

The State Supreme Court reversed the Court of Appeal's finding of bad faith and adopted the trial court's award.

In the firm conviction that the decisions in these cases constitute an unconscionable burden on the taxpayers and upon the federal and state treasuries and an unreasonable impediment to the policy of the Congress to build a System of National Defense Highways, the State now seeks a writ of review by the United States Supreme Court.

1 (f) The decisions in these cases have now become final in the highest Court in the State judicial system.

Although the federal question of the use of federal funds and the unreasonable burden placed upon the federal and state treasuries was implicit in the proceedings at all times, the question, as such, was never placed at issue, nor could it be until this time, in the nature of the case.

1(g) The application here is to review the decisions of a state court and not a federal court.

1(h) Argument

MAY IT PLEASE THE COURT:

The position of the Department of Highways in these cases has consistently been that a person could not acquire land or make improvements with the knowledge that the land and/or the improvements are to be required for a public improvement, with the purpose of making a profit from the public effort to serve the public need for public improvements.

The Department has contended throughout that the market value of the property acquired for a public improvement is not necessarily the measure of just compensation; that it must be higher in some instances where, for example, there might be no market or, as here, the landowner has deliberately and with knowledge acted to increase his profit, and the burden of the cost to be borne by the public in the construction of a public improvement.

The Department's position is based upon the decent and equitable principle that no citizen has the right to conduct his affairs so that the public is compelled to pay more for its public improvements than would otherwise be true, when those activities are with the knowledge and the purpose of profiting from the public effort to serve the public needs. This is similar to a principle long recognized by our courts that all persons must act to minimize damages which they have the right to assert against others, and which they cannot recover when they have negligently and knowingly maximized those damages.

The Department has not been compelled here to chart a new course in this effort, since our own Supreme Court adopted the principle we now espouse and did it in an expropriation suit, the decision of which (State v. Laird) is cited and relied upon in the above quotation (1-e) from the decision of the Court of Appeal in reversing the trial court in these cases.

Here we have, the State Supreme Court's devotion to a formula (market value as measure of just compensation) to the blind exclusion of the basic requirement that compensation in eminent domain acquisitions must be just, both to the landowner and to the public and, in this case, may not be such as to impose an undue burden on the federal and state treasuries, and operate as an unreasonable restraint upon the efforts of the Congress to implement the national purpose of building a System of National Defense Highways.

1(i&j) Copies of the final decisions of the State Supreme Court in these cases are appended hereto, together with the Court's Per Curiam and notice of refusal of rehearing.

WHEREFORE, petitioner prays that a writ of certiorari issue to Louisiana State Supreme Court and that, after due proceedings had, the rule of just compensation fixed by the Court of Appeal (State), Third Circuit (quoted above), be adopted and that just compensation be fixed in the case of State v. Charles A. Patout and Lawrence C. Richard, at $34,830 and State v. Vermilion Development Company, Inc., at $18,074, the reimbursement value of the land expropriated and the salvage value of the improvements expropriated.

State of Louisiana, through
the Department of Highways,

BY ATTORNEYS:

NORMAN L. SISSON

ROBERT J. JONES

CHESTER E. MARTIN

VERIFICATION

STATE OF LOUISIANA

PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned authority, personally came and appeared

. . . . . CHESTER E. MARTIN . . . .

who, being first duly sworn, declared:

That he is one of the attorneys for the plaintiff, petitioner, in the above and foregoing application for writ of certiorari or review; that all the facts set forth therein are true and correct; that a copy of the application has been mailed to the defendants, through their attorney of record, Mr. Frank Smith, Jr., 221 West Main Street, P. O. Box 2609, Lafayette, Louisiana 70501, prior to presenting said petition to the United States Supreme Court for filing.

CHESTER E. MARTIN

Sworn to and subscribed before me this 26th day of July, 1971.

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SUPREME COURT OF

SUPREME COURT OF THE STATE OF LOUISIANA

* * * * * * * * * * *

STATE OF LOUISIANA, THROUGH
THE DEPARTMENT OF HIGHWAYS,
Plaintiff–Appellant

vs. NO. 50614

CHARLES A. PATOUT ET AL.
Defendants–Appellees

* * * * * * * * * * * (50617)

STATE OF LOUISIANA, THROUGH
THE DEPARTMENT OF HIGHWAYS,
Plaintiff–Appellant

vs. NO. 50615

VERMILION DEVELOPMENT CO., INC.
Defendant–Appellee (CONSOLIDATED)

* * * * * * * * * * *

BRIEF ON BEHALF OF THE STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF HIGHWAYS, ON REVIEW OF DECISIONS OF THE COURT OF APPEAL, THIRD CIRCUIT

* * * * * * * * * * *

D. ROSS BANISTER
CHESTER E. MARTIN
JOHNIE E. BRANCH, JR.

FOR PLAINTIFF
STATE OF LOUISIANA, THROUGH
THE DEPARTMENT OF HIGHWAYS



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CONSTITUTION

Louisiana Constitution of 1921;
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STATUTE

LSA-R.S. 19:2 and 19:12.

JURISPRUDENCE

State v. Laird, 219 La. 567, 53 So.(2d)674, 676, 677 (1951);
Parish of Iberia v. Cook, 23 La. 697; 116 So.(2d) 491 (1959);
State v. Mason, 254 La. 1035, 229 So.(2d) 89 (1969);
State v. Mouledous, 199 So. (2d) 185,192-193 (1967);
State v. Miller, 250 La. 668, 198 So.(2d) 397,400 (1967)
(1967);
State v. Patout, 236 So.(2d) 40,48 (1970)

CYCLOPEDIA

29-A C.J.S. 748, Eminent Domain, Section 175(1)
27 Am. Jur. (2d) 105-106, Eminent Domain Section 294.

JURISDICTION

The Supreme Court reviews decisions of the Courts of Appeal under the authority of Art. VII, Sec. 11 of the Louisiana Constitution of 1921 and LSA-R.S. 13:4450

SYLLABUS

1. "A landowner who buys or makes improvements within an area he knows will be required for a public improvement is entitled to be compensated for the land at an amount no greater than he paid and to be compensated for the improvement at an amount no greater than the salvage value of the improvements." As was enunciated here by the Court of Appeal.

State v. Patout, 236 So. (2d) 40, 48 (1970).

State v. Laird, 219 La. 567, 53 So.(2d) 674, 676, 677 (1951);

Eminent Domain, § 294, 27 Am. Jur. (2d) 105-106;

Eminent Domain, § 175(1), 29-A C.J.S. 748.

2. Land which is available and in demand as a subdivision must be valued in the condition in which it was taken and as it would be bought by a developer.

Parish of Iberia v. Cook, 238 La. 697, 116 So.(2d) 491 (1959)

3. Damages cannot be awarded to a landowner on land which he does not own, since suit can be brought only against "owner" and only the "owner" is assure just compensation.

LSA-R.S. 19:2

Art. 1, Sec. 2, Louisiana Constitution of 1921;

Art. 1, Sec. 19.1, Louisiana Constitution of 1921.

4. Damages to remaining land cannot be based on speculation as to delay in use but must be based upon a before and after valuation.

State v. Mason, 254 La. 1035, 229 So.(2d) 89 (1969).

5. An award cannot be made in an expropriation suit for damage to property not involved in the suit.

State v. Mouledous, 199 So.(2d) 185,192-193 (1967).

SUPREME COURT OF THE STATE OF LOUISIANA

STATE OF LOUISIANA, THROUGH
THE DEPARTMENT OF HIGHWAYS,
Plaintiff–Defendant NO. 50,614

VS.

CHARLES A. PATOUT ET AL.
Defendants–Appellees NO. 50,617

STATE OF LOUISIANA, THROUGH
THE DEPARTMENT OF HIGHWAYS,
Plaintiff–Defendant NO. 50,615

VS.

VERMILION DEVELOPMENT CO., INC.
Defendant–Appellee (CONSOLIDATED)

MAY IT PLEASE THE COURT:

STATEMENT OF THE CASE

(Page numbers used, unless otherwise indicated, are those used in the transcript of testimony)

The State of Louisiana, Through the Department of Highways, expropriated certain property in the Parish of Lafayette for the construction of Interstate Highway I-10, which is a new highway across the southern part of the State and running the entire width of the State.

There were three suits filed, one against Charles A. Patout, Lawrence C. Richard, and Albert Richter, and two against Vermilion Development Company, Inc., which corportation was owned by Charles A. Patout, his brother, Eugene Patout, and Lawrence C. Richard. (The first and last named being the defendants in the first suit.)

The three suits were consolidated for trial which was assigned for June 21, 1965. On that date, one of the

suits against Vermilion Development Company, Inc., was settled and the other two suits went to trial, one against Patout and Richard, Docket No. 33,201, and the other against Vermilion Development Company, Inc., Docket No. 33,209, and the Department's appeal of the two cases tried remain consolidated and they are now consolidated before this Court with writs of review granted to the plaintiff and the defendants.

To aid the Court better to understand these cases and the State's appeal from the trial court's judgments, certain summary information is furnished here in a tabular form:

District Docket	Filed	Defendant	Deposit, estimated just. comp.	Demand	Award
33201	11/12/64	Charles A. Patout et al.	[1] 53,800.00	[2] 522,458.54	137,178.00
33209	11/18/64	Vermilion Dev. Co., Inc.	115,350.00	155,900.00	[3] 128,141.00

These two suits were amended by plaintiff for reasons explained later in this Statement of the Case and the Argument.

33201	4/17/65	Charles A. Patout et al.	34,830.00	Unchanged	Unchanged
33209	4/19/65	Vermilion Dev. Co, Inc.	18,074.00	Unchanged	Unchanged

---

1 The deposit was actually $64,500.00 but by joint petition and judgment Albert Richter's interest was settled by his withdrawal of $5700.00 and this ended his participation in the suit except for a later attempt to intervene, which failed.

2 Plaintiff filed a peremptory exception denying defendants' right to claim to $206,025.12 as damages to property, upon the ground that the property was not owned by the defendants who claimed in paragraph 5 of their answer. The merits were not expressly judged in the trial court other than the trial court's making an award on this item of $27,601 (pp. 17–18 of Reasons), based upon the defendants' testimony.

3 Based on the state's testimony (pp. 21 & 23 of Reasons), of $124,550.00 and on defendants' testimony (pp. 23 & 24 of Reasons) of $3591.00, which was admitted as a proffer but was never accepted by the court until it was included, without comment, in the award (See pp. 109, 210–211, 215 and 512–513 of Testimony), and was also the object of a peremptory exception.

The first and most serious question facing this Court is a determination of the effect of the fact that the defendants bought the property expropriated only after having their own engineer project lines on a map to show what would fall within the proposed right of way, which they then purchased and upon which they then built five houses.

Although various personnel of the Department had various bits of information which, when assembled, led to the conclusion that defendants bought and built within the proposed highway with full knowledge that the Department would require the area for the proposed highway construction, this was not known to the Department's attorney when he filed the two suits in November, 1964, and when he did learn this, amended petitions were filed in April, 1965, alleging generally that because of defendants' previous knowledge, they were entitled to no more than they had paid for the land taken, which they had acquired in January, 1963, and the salvage value of the improvements built upon part of the land in March and February, 1964, just a few months before it was expropriated.

The Department's position is predicated upon the well established principles that a claimant is obligated to minimize his damage, and that he may not deliberately engage in activities in relation to land he knows will be required for highway construction, either by purchase or by construction, so as to increase the cost of the highway construction to the public.

The defendants' objection to this was sustained by the court but was admitted as a proffer (p. 285).

The Court of Appeal agreed with the State's position and adopted its suggested rule (State v. Patout, 236 So.(2d) 40, 48 (1970) but did not apply the rule correctly.

The Department is in substantial agreement with the trial court's summary of the facts and contentions through page 11 of the court's Reasons for Judgment.

The substance of the Department's position, with which the Court of Appeal agreed, is that the defendants knew with a high degree of certainty exactly where the proposed highway would be constructed and, that they deliberately went about acquiring the land involved and con-

structing five residences on five of the lots they acquired. The Department's position is then that the defendants can claim no more than reimbursement for the land on the basis of their purchase price and that they can claim no more than the salvage value of the improvements they constructed on the land they acquired with knowledge that it would be taken for the highway.

The defendants' position seems to be a mixture of contentions that: (1) they did not know where the highway right of way was to be; that, (2) the Department in some way misled them as to the proposed location of the right of way, though they never suggested any reason for this deception by the Department; and that (3) the Department neglected to warn them to stop the construction, though their own testimony shows clearly that the construction was a forced draft operation in a very short period of time, quite clearly planned for completion before the Department could learn of it and take action to stop it.

The trial court held that the Department's position is correct, and is set out in 27 Am. Jur.(2d) 105. The Court apparently agreed with the Department's contention as to the measure of just compensation as set out in the amended petitions, if ".....the defendants in these cases have acted in bad faith." (p. 12 of Reasons).

The trial court then concluded that the defendants did not act in bad faith, after which it turned to the question of fixing the just compensation which would be due, if the defendants acted in good faith.

Thus, the first question to be decided by this Court, in reviewing the decisions of the Court of Appeal, is the good faith of the defendants in buying and building within the right of way of the proposed highway or, said another way, did they do this with full knowledge?

To determine this question will require a review of the testimony, which is made below, after the reading of, which I feel sure this Court, as did the Court of Appeal, will agree with the Department that the defendants bought property and built within the area involved with full knowledge that it was within the right of way of the new highway. If this Court agrees with the Department on this, it will then, it appears, have no alternative but to fix the award at the amended values submitted by the Department,

and this is exactly what the Court of Appeal did as to the houses but refused to do as to land values and damages. If this Court disagrees with the Department, it will then go on to consider the determination of just compensation outside the question of bad faith of the defendants.

I here summarize the facts relied upon by the Department to show the bad faith of defendants:

1. The advertising and holding of a public hearing on the construction of the proposed highway on October 6, 1959, was stipulated (p. 3 of Reasons) and the purchase of the lots involved was made January 29, 1963 (p. 5 of Reasons) and the five houses were constructed in March or April, 1964 (p. 230 of Testimony).

2. The location of the new highway was made known by radio, newspapers and public hearing (p. 35) and a map was displayed showing approximate location of highway (pp. 35 and 36).

3. Defendants' engineer, Laurent, admitted he was employed by defendants in 1961 to determine and locate on the subdivision map, where the highway would be located (p. 153).

4. Defendants' engineer admitted he knew that the interchange at La 3052 meant there would be a highway constructed westerly (p. 168).

5. Defendants' engineer admitted he projected the proposed highway on the subdivision map from a highway map furnished to him by the defendants (pp. 169, 170, 190).

6. Defendants' engineer admitted he plotted the projected highway for the defendants in 1961 (p. 172).

7. Defendants' engineer admitted he knew and told the defendants (in 1961) that the new highway could not vary substantially from his projection (pp. 173 and 181) and that this turned out to be true (p. 174).

8. Defendants' engineer gave copies of map showing projection, to defendants (p. 181).

9. Eugene Patout (defendant) admitted talking to his engineer about extending highway lines from highway map in 1961.

10. Defendant Eugene Patout claimed that the first information he had about where the highway would be was in July, 1964 (p. 231).

11. Defendant Eugene Patout admitted he built the five houses in March and April, 1964 (p. 230) but also admits that when they were expropriated he began the construction of other houses, none of which were completed a year later (p. 233).

12. Defendant Eugene Patout sold first property in subdivision to Department in 1961, at which time he apparently got map showing additional takings to be made (p. 276).

13. Defendant Eugene Patout admitted he had his engineer extend lines of highway through subdivision in 1961 (p. 284) and claimed that his purpose was to avoid it (p. 285).

14. Defendant Eugene Patout admitted that he knew he was building the five houses within the right of way of the highway as projected by his engineer, Laurent (p. 286).

15. Defendant Eugene Patout admitted that the purchase of the 61 lots was a departure from their customary subdivision development, and defendants' objection to this line of questioning was sustained but proffer was permitted (p. 291).

16. Defendant Eugene Patout claimed he acquired the 71 lots (almost exactly falling within the right of way diagonally across the subdivision) so that he could build more expensive houses away from the cheaper houses (p. 292).

17. Defendant Charles Patout admitted employing the engineer, Laurent, to extend lines of new highway in 1961 (pp. 326, 327 and 330).

18. Defendant Charles Patout admitted he suspected the possibility that the 61 lots he bought were within the right of way of the new highway (pp.328-329).

19. Defendants agreed with vendor of lots to move his house, which was on one of them and within the highway right of way (pp. 334-335).

20. Defendant Richard amitted they bought the 61 lots within the confines of the projection done on the map by the engineer, Laurent. See D-19. (pp. 343-344).

21. Richard admitted he knew the location of I-10 when he repurchased the 56 lots (p. 348).

22. Richard admitted that P-26 is letter dated 1/29/63 indicating he knew lot 299 was within the highway

right of way (pp 347-349).

23. The State's employee who was responsible for the survey of the highway placed a stake on the center line in 1959 at each 100 feet (pp. 642, 645 and 646).

24. Another of the Department's surveyors found the center line well marked with red and yellow flags and stakes so that an engineer would have had no difficulty in locating it (pp. 653-654).

25. A surveyor would have had no difficulty in locating the center line of the highway (pp. 656-657).

26. Defendants' purchase of the 61 lots was a total departure from past practice, which had been to purchase one lot at the time and never more than 20 (p. 661). (Comment: obviously previous purchases had followed the plan of orderly development and the purchase of the 61 lots equally obviously was not in accord with orderly development, but was only the purchase of the lots within the highway right of way).

27. Defendants told vendor of 61 lots that they were buying the lots within the right of way (p. 661) and explained that the reason for buying so large a number was because ".....they wanted to make some money on the Highway Department" (p. 667) and told him they would pay for the lots when the Department bought them (p. 666).

28. Vendor of lots showed the highway stakes to defendants before they bought the lots (pp. 663-664).

29. Defendants sold lots to State in 1961 and said they knew where the right of way was at the time (p.669, 676).

30. State's surveyors worked along the line of survey every year from 1958 to 1964 (p. 677).

31. Defendants agreed to move vendor's house out of the right of way (pp. 662-663) but tried to back out (p. 673).

32. Defendants had a scheme for getting additional profit from the public by building a sewer plant within the right of way (p. 668).

33. Defendants admitted to an employee that they knew the location of the right of way (p. 690) and that they knew that the statement from the letter (D-3) from the Department, indicating that no more right of way was needed, applied only to project for the interchange (pp. 689,

692-693).

34. Department's employee responsible for the right of way appraisal learned for the first time in June, 1964, that the five new houses had been built within the highway right of way (p. 696).

35. The defendants, through their corporation, Vermilion Development Company, Inc., one of the defendants here, earlier sold Parcels 6-2 and 6-5 to the Department, which were house slabs on Lots 67 and 69, on the line marking the westerly limits of the Department's land acquisitions for the interchange connecting State Route 3052 (now La-US 167 to I-10). See sheet No. 6, 2nd sheet of Exhibit P-3.

If this Court agrees with the Court of Appeal and finds that the defendants acted in bad faith, it must then determine whether the development agency contract relieves them of the effect of their bad faith as to land values and alleged damages.

All of the above applied equally to both cases on appeal, and on this writ of review.

ALTERNATIVE QUESTIONS

Now, in the alternative, assuming, for our purpose here, that this Court has agreed with the trial court's finding that the defendants did not act in bad faith, or has agreed with the Court of Appeal's finding that the defendants did act in bad faith but that this affects only the award for the five houses, the Court is then confronted with an ordinary problem of fixing just compensation based primarily upon market value of the property expropriated or damaged by the expropriation.

This valuation problem can best be discussed separately as to the two cases, and should be approached by reference to the above table.

Although the Department's original deposit in the Charles A. Patout et al. Case, District Court Docket No. 33,201, was $64,500.00, one defendant, Albert Richter, withdrew in a joint petition for final judgment based upon the deposit for his interest of $5,700.00, and he is no longer in this suit, though he later unsuccessfully attempt-

ed to intervene. Thus, the original deposit by the Department for the interest of the two remaining defendants, Charles A. Patout and Lawrence C. Richard, is $53,800.00.

Reappraisals of the property expropriated from the two remaining defendants resulted in an increase of the estimate of value from the net of $58,800.00 to $67,133.00 by Stanley Tiger and $73,755.00 by Maurice Chappuis, appraisers employed by the Department, and these appraisals were the State's testimony on values.

Although I have absolutely no doubt that the Court's constitutional right and obligation to fix just compensation, leave it free to fix that compensation at an amount lower than that given in the testimony of the highest amount by an appraiser for the State, I will do no more here than explain that amount as the highest possible figure.

Thus, I will analyze Mr. Chappuis' appraisal, the highest given by the State, and compare it with that fixed by the trial court based on the testimony of Mr. Angers, defendants' appraiser, and the results of the testimony of both will be set out later in tabular form.

Mr. Chappuis' appraisal differs in a major respect from that of Mr. Angers in that Mr. Chappuis valued the property west of the westerly lines of Parcels No. 6-34, 6-35 and 6-36 as acreage with a highest and best use for potential subdivision development and he rejected the idea that it had become a subdivision by mere incorporation on a map as a subdivision but was not otherwise developed (pp.753-754).

Mr. Angers treated Parcel 5-18 as the only potential subdivision area taken and treated Parcels 6-30, 6-23, 6-31, 5-21, 5-22, 5-23 and 5-24 as developed subdivision lots with a slightly lesser value per square foot than the completely developed lots.

In an effort to facilitate the Court's consideration of the value conclusions given by the Deapartment in its highest appraisal, made by Mr. Chappuis, in comparison with those adopted by the trial court, made for the defendants by Mr. Angers, the following tabular form of value conclusions have been extracted from the testimony and the exhibits:

Charles A. Patout et al.

Parcel	Area	Chappuis (for plaintiff) Value Taken	Severance Damage	Total	Angers (for defendants) (The award of the trial court) Value Taken	Severance Damage	Total
6-1-R-1		$1100	$ 580	$1680	$ 905	$ 243	$ 1148
6-7-R-1		95	-	95	155	-	155
6-27		20	-	20	Not included	-	-
6-28 & 6-28-A		6150	570	6720	5748	683*	6431
6-33		1920	-	1920	1800	-	1800
6-34		885	835	1720	828	669*	1497
6-36		1540	-	1540	1438	518*	1956
Subtotal		$11710	$ 1985	$13695	$10874	$ 2113	$12987
6-30	37,831 sq. ft.	3040	Damage to		9836	1507*	
6-23	75,614 " "	6075			18904	1610*	
6-31	55,357 " "	4448	all		13839	906*	
5-22	10,559 " "	848			2640	1330*	
5-21	48,736 " "	3916	remainer		12184	2531*	$16049
5-23	24,272 " "	1950			6068	820*	
5-24	1,515 " "	122	parcels		379	666*	
Streets	2.295 Acres	8045				Included in lot evaluation	
5-18	5.216 "	18256	$13360[3]		16691	(6679[1]	
"						(27601[2]	
Subtotal		$46700	$13360	$60060	$80541	$43650	$124191
Total		$58410	$15345	$73755	$91415	$45763	$137178

1 Owned by defendants
2 Not owned by defendants
3 Damage to remainder of all parcels, 6-30 through 5-18 inclusive
* The damage to partially taken lots owned by defendants, a total of $11483

An examination of the above table reveals that the difference in the award (based on Angers) of $12,987.00 and the State's estimate (based on Chappuis) of $13,695.00 is so slight and all values are so similar for Parcels 6-1-R-1 through 6-36, that no consideration of error should be made in the indicated areas.

It is the valuation of the land and damages on Parcels 6-30 through 5-18 in which the wide divergence appears and in which error on the part of the trial court and the Court of Appeal may be found. Mr. Chappuis' estimade for the latter area is $46,700.00 for the land taken, and $13,360.00 for damages to the remainder (owned by the defendants), a total of $60,060.00). Mr. Angers' estimate (which is the trial court's award) is $80,541.00 for the land taken, $16,049.00 (incorrectly stated in relator's earlier brief as $6,679.00) for damages to remaining land owned by defendants and $27,601.00 for damages to remaining land not owned by defendants, a total of $124,191.00 (more than twice that of Mr. Chappuis).

The State contended in the Court of Appeal that four errors were made by the trial court: (1) allowance of values based on a subdivision which was undeveloped corn field, no more than potential subdivision in its highest and best use, (2) in basing its award for damages on the same value, (3) allowance of damage not based upon "before and after values," and (4) allowance of damages to land not owned by the defendants.

The Court of Appeal made these same errors but did make some slight reductions in the award.

And now, again assuming, in the alternative, that this Court has agreed with the trial court's finding that the defendants did not act in bad faith, or has agreed with the Court of Appeal's finding that the defendants did act in bad faith but this affects only the award for the five houses, this Court is confronted with the ordinary problem of fixing just compensation in the Vermilion Development Company, Inc., Case, District Docket No. 33,209.

The deposit in the Vermilion Case was $115,350.00 for the five houses built on five lots, the purchase of which lots and the construction of which houses the State contends were made in bad faith, with which the Court of Appeal agreed but applied in part only. A reappraisal of the

five houses was made and Mr. Chappuis testified to $124,550.00 for the State, but only in the alternative. This was accepted by the trial court (pp. 21 and 23 of Reasons) and is certainly the maximum award which can be justified by the record.

The trial court made an additional award of $3,591.00 to defendants predicated upon an alleged delay in defendants' completion of a house not within the taken area (p. 23 of Reasons).

Since the house and lot were in no way involved in any of these suits, the State objected to any testimony as to this alleged damage (pp. 109, 210-211, 215, and 512-513), which objection was sustained by the trial court and was never overruled except inferentially by the award. Thus, the State contends that the Court erred in making the award on the grounds that it had already sustained the objection, and, further, that it was error to make the award even if it had overruled the objection, since no matter outside of an expropriation suit may be brought into it, and this is the same error that the Court of Appeal approved in its Per Curiam of April 24, 1970.

SPECIFICATION OF ERRORS

1. The opinion of the Court of Appeal erred in holding that a development agency contract in 1958 relieved defendants of the effect of their full knowledge, when they acquired property in 1963 within what they knew was the right of way for a proposed highway (upon a portion of which they then constructed five houses).

2. The opinion of the Court of Appeal erred in holding that the fact that the defendants, Patout and Richard, had a development agency contract to develop an area for subdivision use, justified affiriming the trial court's award for alleged damages to the remaining area to the defendants as "owners" though they owned no part of it and had no right or obligation to buy it.

3. The opinion of the Court of Appeal erred in affirming the trial court's award of $3,591.00 as alleged consequential damages to a house, no part of which house and lot were included in the expropriation.

4. In the alternative, the opinion of the Court of Appeal erred in amending the trial court's award by reducing it by only $18,850.00, which still affirmed an award on the basis of speculation as to what subdivision lots might be worth when and if the area should be developed and sold as lots.

5. In the alternative, the opinion of the Court of Appeal erred in affirming the trial court's award of $45,763.00 as alleged damages to the remaining property (only a small portion of which defendants owned) based upon speculation of a delay in developing, instead of on a "before and after" valuation.

BRIEF ON SPECIFICATION OF ERROR NO. 1

The Court of Appeal very correctly enunciated the rule of law: "A landowner who buys land or makes improvements within an area he knows will be required for a public improvement is entitled to be compendated for the land at an amount no greater than he paid and to be compensated for the improvement at an amount no greater than the salvage value of the improvements." Citing State v. Laird, 219 La. 567, 53 So. (2d) 674, 676 (1951); Eminent Domain, § 175(1), 29-A c. J. S. 748; Eminent Domain, § 294, 27 Am. Jur.(2d) 105-106.

On the question of bad faith of the defendants in their deliberate purchase of 61 lots and the construction of five houses within the highway right of way, I know no way bad faith can be shown more convincingly than is shown by the testimony of the defendants themselves..

The defendants acquired a map from the Department in 1961 which showed the proposed projection of I-10 from the interchange with State Rouge La 3052 and they had their own engineer project the proposed highway on a map of the subdivision and they then bought the lots which fell within that projection and built five houses upon five of the 61 lots.

The defendants' own testimony makes clear that from 1961 until the expropriation in 1964 they knew exactly or almost exactly where the highway would be constructed and in 1963 they purchased 61 lots so staggered diagonally in their location across the (paper) subdivision as to leave absolutely no doubt that they were acquiring the property with absolute certainty that it would be sold to the State for an enormous profit. (They paid $2000 per acre and the trial Court awarded them 25¢ to 28¢ per square foot, or approximately $10,000 per acre, excluding "streets"). And they even took the precaution of compelling the vendor to wait for his pay until they had the payment from the State, itself clear evidence they knew full well the land was within the highway right of way.

And not satisfied with the profit they planned to get, and have gotten, on the land, profit paid by the public, they had the unmitigated gall to build five houses on five of the

61 lots. And even with this brazen behavior, did they build the standard quality house for the subdivision. No, they built houses of nearly twice the value typical of the subdivision, quite obviously in a final further effort to exact additional profit from the public's efforts to build highways. And the defendants say this is not bad faith and, infinitely worse, the trial court agreed and let them escape their richly deserved retribution. Now this Court is implored to impose justice upon this scheme of the defendants, in accordance with the rule enunciated by the Court of Appeal.

While I have seen many "sales" of land I suspected to be for the purpose of creating large values for land in anticipation of the construction of a highway, and the construction of the Interstate System is especially vulnerable to this because of the requirement of public hearings and total revealing of plans years before they may mature, there is very little jurispurdence on the subject in this State, and not a lot anywhere.

The only case found in Louisiana dealing directly with this sort of problem is State v. Laird, 219 La. 567, 53 So.(2d) 674 (1951).

In the Laird Case the Department of Highways filed suit on June 4, 1947, under the general expropriation statutes (LSA-R.S. 19:1 et seq.) for the expropriation of a tract of land for highway purposes. Under this statute the Department acquired no title, right or interest in the land being expropriated until the judgment of expropriation was granted and the award was paid,[1] which was at least a year later, though the exact date is not given in the opinion.

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1 Defendant ". . . was divested of the ownership of his land only after the judgment of the trial court was rendered, read, and signed, and the deposit was made in the registry of the Court." State of Louisiana, through Sabine River Authority v. Miller, 250 La. 668, 198 So.(2d) 397, 400 (1967).

The original defendant sold the property more than a year after the suit was filed but before it was finally tried and before the judgment was rendered and before the deposit of the award was made. In short, when the property was sold the State had acquired no interest in the property of any kind, with the effect that, by comparison with the matter involved here, defendant-vendor and defendant-vendee had been notified that the ownership of the property was being sought for public use.

The vendee of the property, presumably relying on the fact that his property had not yet been expropriated but with knowledge of the pendency of the suit and before judgment was signed and the deposit made, constructed certain changes in the property. He built a garage and began business in it and made other related changes in the property.

On the trial of the case the defendant-vendee (Habert) was awarded, among other thing, "$300.00 for removing and reconstructing garage; $42.00 for building another driveway to butane tank and reconstructed garage;" and "$750.00 for consequential damages," all of which were denied by the Supreme Court on the ground that when the garage was built and the business in it was begun, the defendant-vendee had knowledge that the expropriation of the property was in prospect.[2]

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2. "Although the record is not clear on whether Habert knew of the pendency of these proceedings at the time he purchased the property, he himself admitted that he knew of them on the day he signed the act of sale, though subsequent to the signing. This knowledge, together with the warning given him by the Highway Department representatives when he began construction of his new garage, certainly bars recovery for removing and reconstructing the same and for rebuilding his driveway. These two items ($300 and $42) will therefore be disallowed.

". . . we hold that appellee's admission that he had built the shop after his purchase, and therefore, after he had received knowledge of the pendency of these proceedings, together with his failure to prove the income of this shop, answers his own contention adversely. The consequential damages, not being proven, cannot be allowed." (Emphasis added) State v. Laird, 219 La. 567, 53 So.(2d) 674, 676, 677 (1951).

I submit that we have, for our purposes here, an exactly parallel situation to that of the Laird Case, supra.

At the time Habert (purchaser of the Laird property) bought and built his garage and began his business on the property to be expropriated, he knew that the property would be or, at least, might be expropriated. On that ground alone, the Supreme Court held that he could not recover for damages to changes he had made in the property after he had that knowledge.

This is exactly the position of the State in this case. The State contends that defendants purchased the property for $2,000 per acre and built five houses upon it, not only with knowledge that it would be expropriated but with absolute certainty that it would be done, and that they did not act upon this knowledge until they had technical assistance from their own engineer in locating and making certain where the acquisition would be.

It does not appear to me that the Supreme Court's decision in the Laird Case, supra, turns upon the question of good or bad faith but merely upon the question of knowledge of the prospective expropriation, which concededly may be a euphemistic description of "bad faith."

The general tenor of the very limited number of decisions in other jurisdictions seems to hinge squarely upon bad faith and the rule is well stated in paragraph 294, Eminent Domain, 27 Am. Jur. (2d) 105-106[3] and in paragraph 175(1), Eminent Domain, 29-A C.J.S. 748.[4]

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3 "Where. . . a building is erected or moved upon land which the owner knows is to be taken by eminent domain, and is placed upon such land in bad faith, with the sole purpose of enhancing the damages and not in the natural, ordinary, and legitimate use of such property, the building remains personal property and should not be considered in determining the value of the real estate." Eminent Domain § 294, 27 Am. Jur. (2d) 105–106.

4 "While one may in good faith purchase or improve land regardless of any probability of a subsequent appropriation for public purposes, no compensation can be recovered for improvements placed on the land for the sole purpose of enhancing the damages to be recovered on a subsequent condemnation." Eminent Domain § 175(1), 29–A C.J.S. 743.

It seems obvious that in a case of this kind, as in most eminent domain issues, the courts have a very difficult task of balancing the rights of the landowners against those of the public to arrive at constitutionally "just compensation."

Here the Court must balance the traditional right of the landowner to do with his land as he pleases, so long as he avoids harm to others, with the public's right to be protected from the exploitation and sharp practices of those who seek to profit unfairly from the public's efforts to furnish needed public improvements.

The courts appear to have struck a balance along the lines of good or bad faith, which appears to be the question of whether the change in the landowner's position, upon which he bases his demand for compensation, was made with knowledge of the future expropriation and for the purpose of exacting more compensation from the public than he would have been entitled to receive had he not made the change.

I submit that where these two factors are present the courts cannot permit the guilty landowner to demand the compensation he would be due had he not had the knowledge and acted to obtain the unfair advantage.

Again, I submit that the actions of all defendants clearly show that they, and each of them, knew that the property they were acquiring and improving was squarely withing the highway right of way and would, of necessity, be acquired by the State. In my view, this is all that our Supreme Court has required to defeat the demand of a landowner in the situation we have here.

But we can and must go on to say that the actions of all the defendants show not only that they acted with full knowledge but that they acted with the intent of increasing their claim against the State.

If the actions of the defendants in this case do not constitute bad faith and defeat their demands, I cannot possibly conceive of actions which would.

The award should be fixed at the value fixed in the amended petitions of plaintiff, $34,830.00 for Charles A. Patout and Lawrence C. Richard, and $18,074.00 for Vermilion Development Company, Inc.

The Court of Appeal held that its enunciated rule reduced the award for the houses to salvage value but also held that since a development agency contract (Exhibit D-38), copy of which is in Appendices) pre-dated defendants' knowledge of the highway construction and the land they acquired in pursuit of the contract long after they knew of the proposed highway construction, with the avowed purpose of "making a lot of money from the State," did not come under the rule, and thus fixed compensation for the land (lots on which the houses were constructed) without regard to the rule. The Court of Appeal then decided that merely because the defendants had entered into an agency contract in 1958 with the owners of land, to develop and sell the land as lots, which contract obligated the owner to accept, as his part of the transaction, compensation of $2,000.00 per acre, the defendants could buy the land, not as part of the development contract but in order "to make a lot of money" out of the State, and then be compensated for the land they bought at $2,000.00 per acre at the rate of approximately $10,000 per acre.

The Court of Appeal apparently decided that, since they might be said to have the right to acquire the property for $2,000.00 per acre, they were then free to do so (though certainly not compelled) even after they knew the property was within the right of way of a proposed highway, and, in fact, acquired it for that reason and no other.

The contract shows not only that the defendants did not obligate themselves to buy the land, it did not even give the right to buy it. The contract was to develop the land and sell the lots and the landowners agreed to accept, at that time, $2,000.00 per acre for the land and to sign the contract of sale.

BRIEF ON SPECIFICATION OF ERROR NO. 2

The Court of Appeal made an award of damages to the agents of the owner just as though the agents were the owners and this violates the plain provisions of the law in that it assures just compensation only to the owners of the property expropriated.

LSA-R.S. 19:2:

"Where a price cannot be agreed upon with the owner, ~~any~~ of the following may expropriate needed property:

"(1) The state or its political corporations or subdivisions created for the purpose of exercising any state governmental powers;" (The other expropriating authorities named are irrelevant here) (Emphasis added)

LSA-R.S. 19:12:

"If a tender is made of the true value of the property to the owner thereof, before proceeding to a forced expropriation, the costs of the expropriation proceedings shall be paid by the owner." (Emphasis added)

Art. 1, Sec. 2, Louisiana Constitution of 1921:

"No person shall be deprived of life, liberty or property, except by due process of law. Except as otherwise provided in this Constitution, private property shall not be taken or damaged except for public purposes and after just and adequate compensation is paid." (the owner) (Emphasis added)

Art. 6, Sec. 19.1:

"The Legislature shall have authority to authorize the taking of property for highway purposes by orders rendered ex parte in expropriation suits prior to judgment therein provided that provision be made for deposit before such taking with a court officer for the amount of appraisals of the property so taken and damages to which the owner thereof may be entitled, if any, which appraisals may be made

in such manner as may be provided by law either before or after institution of suit, and need not be by judicially appointed appraisers." (Emphasis added)

The concept of agency coupled with an interest does not establish a property right to the land in the agent but merely limits the principal's freedom to terminate the agency, exactly as the agency contract expressly provides. But the agents had a built-in limitation to their obligation: they developed only as they sold.

It would appear that nothing could be clearer and more completely self-evident than that an agent who has a contract to develop land for an owner cannot by that reason be treated and awarded damages as an owner.

BRIEF ON SPECIFICATION OF ERROR NO. 3

The question of the trial court's award of alleged damages of $3,591.00 to Vermilion is substantially the same as that raised in State v. Mouledous, 199 So.(2d) 185, 192-193 (1967) in which the landowner's claim for damages were rejected in the expropriation of other land belonging to the defendant there.

The grave injustice done the Department in such an award lies in the fact the issue of whether the damage was actually done or, if done, was compensable, was never joined, and this is highlighted by the fact that the trial court substantially sustained the State's peremptory exception on this when he refused to admit testimony by the defendant, even though it did come in under proffer.

The damage was alleged to have been caused by the temporary interference with the access to the property, which is a type of damage not generally classed as compensable under eminent domain.

BRIEF ON ASSIGNMENT OF ERROR NO. 4

This alternative argument is made as to valuation if this Court should disagree with the above.

The trial court's award for the undeveloped land which was expropriated and which was owned by the defendants was based upon the speculation as to what the land would sell for in developed lots and this approach is exactly the one rejected by this Court in Parish of Iberia v. Cook, 238 La. 697, 116 So.(2d) 491, 496 (1959).

In the Cook Case, supra, this court thoroughly digested the jurisprudence on this point, citing many cases by this court which it summarized as:

> ".....we hold that contemplated subsequent subdivision of property and sale of lots after expenditure of considerable sums on improvements cannot serve as a basis of valuation at date of institution of expropriation, such hopes and plans partaking too much of the character of speculation." (Emphasis added)

This Court in the same Cook Case on the same point, in rejecting exactly the basis of valuation accepted here by the trial court and the Court of Appeal, said:

> "The owner's plans or hopes for the future should be held completely irrelevant, being more often illusory than real. Situations may arise where land is actually available for commercial development, as subdivided lots. The measure of compensation in such instances should not be the aggregate of the prices of the lots into which the tract could be divided, for so many contingencies may intervene as to make such measure of compensation too uncertain and conjectural. The test is the market value of the land as a whole, taking into consideration its value for building purposes of a not too speculative nature." (Emphasis added)

This Court continued, " of most importance in determining market value are sales of similar properties in the vicinity of that sought to be expropriated."

There is very little to be said to show why the trial court and the Court of Appeal awarded approximately $10,000.00 per acre to a corn field other than the fact that the

defendants were able to find an appraiser who would testify that the corn field would be valued by a purchaser (the market value) as lots just because it was included in a "subdivision plan" even though no development had taken place.

I see no way the defendants' appraiser could distinguish the value of the corn field within the mapped area at $10,000.00 per acre from the corn field adjacent to it at $3,200.00 per acre. I ask the Court to look at the appraiser's painfully clumsy effort to explain this (Testimony 568-569).

It is my considered opinion that both lower Courts' acceptance of the defendants' evaluation of the corn field is squarely in conflict with the Cook Case, of which it is accurate to say that the landowner sought to value the expropriated property as lots which should be rejected as an ".....owner's plans or hopes for the future.....(and)..... completely irrelevent, ...being more.....illusory than real."

In this case, the landowners had the right to develop and sell the area and had been attempting to sell the portion of the area they already owned as lots since 1958 (6 years at the time of the expropriation) and had not considered it desirable to pay $2,000.00 per acre for it until they learned it was to be expropriated, which they obviously would have been happy to do, had it actually been worth $10,000.00 per acre, as was estimated by defendants' appraiser, Mr. Angers, which was the award made by the trial court, and approved to a large extent by the Court of Appeal.

I admit that this highly optimistic approach by Mr. Angers is not an unusual appraisal approach, and that although Mr. Chappuis used substantially the same method to test his acreage approach with a substantially different result, the trial court's acceptance of Mr. Angers' appraisal of the part taken is manifestly erroneous not only as "illusory" but also in that it assumes that all can be developed and sold on the day it was expropriated when their own testimony shows that they had sold less than remained and that it had taken them six years to do it. Mr. Angers could and did very happily compute the delay in developing and selling the remainder for five years

and call this damage but he failed to use this same sort of discount to reduce the value of expropriated lots to reflect the inescapable delay in developing and marketing the lots. This is obviously serious and manifest error.

And now we come to the problem of comparing in detail the appraisal made by Mr. Chappuis and that made by Mr. Angers, the latter of which was adopted by the Court.

As is shown in the statement of the case and the tabular arrangement made a part of it, there is no really significant difference in the defendants' appraisal by Angers, the Court's award, and that made by the State's appraiser, Chappuis, as to Parcels 6-1-R-1 through 6-36. And this is substantially true as to Parcel 518 except as to damages, in which the two appraisers treated the remainder as a different area.

But for the purpose of comparison of the area in which the great divergence in value is to be found it is probably best understood as all the area west of the Parcels 6-34, 6-35 and 6-36.

In this area (Parcels 6-30 through 518), the State's appraiser fixed the value of the part taken as $46,700.00 and the defendants' appraiser and the trial court fixed the value as $80,541.00.

This astounding difference lies almost entirely in the fact that Mr. Chappuis fixed the value of the undeveloped portion of the land taken by comparison with the sales of other undeveloped potential subdivision properties, while Mr. Angers' estimate assumes an instantaneous sale of all the property in fully developed subdivision lots. I do not see how this estimate could be given serious consideration and it actually is contradicted by Mr. Angers' methods of computing damages (delay in development and sale of lots) invalid really for either.

But the trial court not only gives it serious consideration, he adopted it in toto and it was only slightly reduced by the Court of Appeal.

BRIEF ON SPECIFICATION OF ERROR NO. 5

The Court of Appeal's affirming of the trial court's award of $45,763.00 (on land most of which defendants did not own - - see Error 2 above) is based upon speculation as to delay in development and is thus squarely contrary to this Court's recent ruling that damages must be determined by a comparison of the before and after values. State v. Mason, 254 La. 1035, 229 So.(2d) 89 (1969).

To better understand this problem, it seems appropriate to make a comparison of the estimates of damage to the remainder, as estimated by Mr. Chappuis and as estimated by Mr. Angers, the latter of which was adopted by the trial court.

To see a graphic representation of the areas treated by Mr. Chappuis in his damage study, please refer to the copy (Exhibit No._____) of his appraisal report in the record and turn to the first map in addenda showing the part taken in orange and the remainder in green. He treated the entire area owned by defendants west of the developed lots, the parcels show above, not including Parcel 518, as having a before value of $3,500.00 per acre and an after value in the north remainder of $2,500.00 per acre on 8.3 acres, a damage of $8,300.00, and $1,000.00 per acre on 2.03 acres, the "step like" area left after the taking from the 61 lot purchase, a damage of $5,075.00, a total of $13,375.00 but which he called $13,360.00, arrived at by various "rounding" of individual totals.

Mr. Angers' estimate of damages to the remainder, and I think that nowhere can wilder speculation be found in any appraisal, contains very obvious and very definitely manifest errors, all of which were adopted by the trial court, and substantially adopted by the Court of Appeal.

Mr. Angers' first error, and that of the trial court, in his estimate of $43,650.00, is caused by the same error made in the valuation of the part taken: valuing a corn field as developed subdivision lots in demand as such.

Mr. Angers' next error, and that the trial court, is found in the fact that he assigned "damage" to the defendants on property they do not own but only have the right to develop (profitable) and pay $2,000.00 per acre

for it, at such time as the orderly development of the proposed subdivision may make necessary (p. 530). Mr. Angers' error is based on his legal opinion that the development contract is an "agency coupled with an interest," which, of course, was adopted by the trial court and which is clearly manifest error, but it is one made also by the Court of Appeal.

Mr. Angers was then able to decide that the undeveloped land which the defendants did not own was worth $7,601.00 per acre (no comparables to show this) before the highway construction for five years and that this would result in a reduction in value by 25% (pp. 532-534).

Defendants' appraiser made the same erroneous estimate of damage which has recently been rejected by our Supreme Court in State v. Mason, supra, decided November 10, 1969.[5] He failed to base damages on the "before and after" rule.

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5 "The rule is stated by this Court in State v. Central Realty Investment Company, 238 La. 965, 117 So. (2d) 261, as follows:

"It is well settled in our jurisprudence that damages allowable under Section 2 Article 1 of the Constitution of 1921, resulting from expropriation of property rights is the difference between the market value of the property for sale or rental purposes immediately before and immediately after the expropriation. Harrison v. Louisiana Highway Commission, 101 La 839, 188 So. 354; American Tel. & Tel. Co. of Louisiana v. Maguire, 219 La. 740, 54 So.(2d) 4 and Texas Pine Line Company v. Barbe, 229 La. 191, 85 So.(2d) 260.

"See also State v. Hub Realty Company, 239 La. 154, 118 So. (2d) 354 (1960). Nichols on Eminent Domain, 3rd Ed., in Vol. 4, states the rule thusly:

" 'Section 14.232. Before and after rule.

" " " * * the measure of compensation when part of a tract is taken is the difference between the fair market value of the whole tract before the taking and the fair market value of what remains after the taking.'

"Louisiana cases cited in support of the foregoing text are American Tel. & Tel. Co. of Louisiana v. Maguire, 219 La. 740, 54 So.(2d) 4; Parish of Lafayette, etc. v. Hernandez, 232 La. 1, 93 So.(2d) 672; Efurd v. City of Shreveport, 235 La. 555, 105 So. (2d) 219; and State v. Central Realty Investment Company, 238 La. 965, 117 So.(2d) 261." State v. Mason, Sup. Ct. November 10, 1969 (not yet reported).

Throughout this mumbo-jumbo about a five year delay, he neglected to notice that the same rate of development of the subdivision from 1953 to 1964, which took defendants west only to May Street, would have gotten them to this remainder many years later than his estimated five year delay. In other words there would be no delay which could be attributed to the highway construction.

By the utilization of the theory of a five year delay, as caused by the highway construction, Mr. Angers decided that the 25% damages amounted to $27,601.00 to the north remainder, not owned by defendants, and $6,679.00 to that owned by the defendants, to that portion of the platted subdivision, and this damage was awarded to the defendants by the trial court, and approved by the Court of Appeal. (At this point, it should be pointed out again that the defendants did not own the property and conceivably never would. They only had the right to develop it and certainly could avoid that if they really felt that the property had been damaged or otherwise decided it was unprofitable). Of course, the State's appraiser did not estimate damage to property not owned by the defendants.

Mr. Angers then estimated $11,483.00 damages to the lots owned by the defendants, both those they acquired in the normal course of their business (maybe) and the 61 lots they acquired along the proposed highway right of way, a portion of which lots were expropriated.

On the area in the platted subdivision not owned by the defendants, Mr. Chappuis fixed no damage and he estimated damage of $1,985.00 on the lots owned by defendants and parts of which were left after the taking of Parcels 6-14R-1 through 6-36.

The accumulated errors made by Mr. Angers for the defendants, account for the errors of the trial court and explain why the State's estimate in this area was $13,360.00 and that of Mr. Angers and the Court, $43,650.00.

And it is in these two areas of evaluation, both as to the part taken and the damages to the remainder, that this Court must resolve the trial court's errors and those of the Court of Appeal.

SUMMARY

In summary, it is submitted that this case presents the standard evaluation conflict in expropriation cases in which both sides contend they are basing their conclusions on sales, but upon widely differing sales: raw land suitable for subdivision on one hand and developed subdivision lots on the other. On this problem, I realize that the resolution is largely a matter of expert opinion and one which is often settled by the appellate court as a manifest error problem. And on this there is certainly room for honest differences of opinion.

But there are three very serious legal issues involved in these two cases and they pose the most serious problems for this Court: (1) the effect on the fixing of just compensation by the fact that the landowner bought land and built houses within what he knew to be the highway right of way, but did this before it was expropriated; (2) the awarding of damages to defendants allegedly suffered by land which they did not own but did have a right to develop under a development contract; and (3) the award of damages allegedly suffered by property owned by defendants but not involved in the suits.

I submit that the trial court grievously erred in each of the legal questions, as did the Court of Appeal, in the application of its rule, and, if this Court agrees, the (fact) error of method of evaluation made by the trial court and the Court of Appeal is not involved.

I further submit that, if this Court agrees with the trial court on these facts or the Court of Appeal on the legal questions or the facts, this Court has facts enough in the record and pointed out above to see the Court's error in excess valuation as to the case involving Charles A. Patout et al., and to approve the award in the case of Vermilion Development Company, Inc., except the inclusion of damages to property not involved in the suit.

WHEREFORE, the premises considered, plaintiff, petitioner herein, prays that, after due proceedings, the judgments of the Court of Appeal, Third Circuit, dated March 12, 1970, and two Per Curiams be amended to fix just compensation to the defendants, Charles A. Patout and Lawrence C. Richard (3014 in the Court of Appeal) at

$34,830.00, and to the defendant, Vermilion Development Company, Inc., (3015 in the Court of Appeal) at $18,074.00, and ordering the defendants to return to the plaintiff all which was paid to them in excess of awards, together with interest at the rate of 7% per annum from the date defendants received the excess to the date it is returned to plaintiff.

BY ATTORNEYS,

D. ROSS BANISTER
CHESTER E. MARTIN
JOHNIE E. BRANCH, JR.

BY _____
CHESTER E. MARTIN
Of Counsel

CERTIFICATE

A copy of the foregoing was mailed this date to Mr. Frank Smith, Post Office Box 2609, Lafayette, Louisiana 70501, attorney for the defendants.

Baton Rouge, Louisiana, March 12, 1971.

_____
CHESTER E. MARTIN

STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF HIGHWAYS,

VS.

CHARLES A. PATOUT, ET AL.

NUMBER 33,201

15TH JUDICIAL DISTRICT COURT

PARISH OF LAFAYETTE
STATE OF LOUISIANA

PEREMPTORY EXCEPTION

NOW INTO COURT, through its undersigned counsel, comes the plaintiff, STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF HIGHWAYS, and excepts to the answer and reconventional demand of defendants on the following grounds.

1. Paragraph Five (5) thereof asks for damages to property which is not owned by defendants in this suit; therefore, defendants have no right nor cause of action therefor.

s/ Marshall W. Wroten
MARSHALL W. WROTEN
Attorney for Exceptor

CERTIFICATE

I certify that a copy of the foregoing pleading has been served on the opposing parties herein, by handing a copy to Lucien C. Bertrand, Jr., their counsel of record.

s/ Marshall W. Wroten
MARSHALL W. WROTEN
Attorney for Exceptor

STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF HIGHWAYS,	**NUMBER 33,209**
VS.	**15TH JUDICIAL DISTRICT COURT**
VERMILION DEVELOPMENT COMPANY, INC.	**PARISH OF LAFAYETTE STATE OF LOUISIANA**

PEREMPTORY EXCEPTION

NOW INTO COURT, through its undersigned counsel, comes the plaintiff, STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF HIGHWAYS, and excepts to the answer and reconventional demand of defendant on the following grounds:

1. Paragraph Four (4) asks for damages due to non-accessibility, when in fact there will be accessibility, therefore defendants have no right nor cause of action therefor.

2. Paragraph Five (5) asks for damages for nonaccessibility to a warehouse on Lots 38 and 39, when in fact there will be accessibility; furthermore, plaintiff herein has paid defendants for damages, if any, with respect to said property; therefore, defendants have no right nor cause of action therefor.

s/ Marshall W. Wroten
MARSHALL W. WROTEN
Attorney for Exceptor

CERTIFICATE

I certify that a copy of the foregoing pleading has been served on the opposing parties herein, by handing a copy to Lucien C. Bertrand, Jr., their counsel of record.

s/ Marshall W. Wroten
MARSHALL W. WROTEN
Attorney for Exceptor

STATE OF LOUISIANA, THROUGH
THE DEPARTMENT OF HIGHWAYS

VERSUS CIVIL DOCKET NUMBER 33,201

CHARLES A. PATOUT, ET AL

STATE OF LOUISIANA, THROUGH
THE DEPARTMENT OF HIGHWAYS

VERSUS CIVIL DOCKET NUMBER 33,209

VERMILION DEVELOPMENT COMPANY,
INC.

STATE OF LOUISIANA, THROUGH
THE DEPARTMENT OF HIGHWAYS

VERSUS CIVIL DOCKET NUMBER 33,292

VERMILION DEVELOPMENT COMPANY,
INC.

CONSOLIDATED

REASONS FOR JUDGMENT

These are all expropriation suits by the Department of Highways, State of Louisiana. Suit No. 33201 was filed November 17, 1964 against (1) Charles A. Patout, (2) Lawrence C. Richard and (3) Albert A. Richter for the taking of land for the construction of Highway I-10. The sum of $64,500.00 was deposited by the Department as being fair compensation. The lands involved here are 16 tracts, most of them located in Richter Park Subdivision and Extension No. 2. A portion of the land lies to the west of the extension. There were no improvements on this land.

On January 5, 1965 a judgment was rendered in favor of defendant, Albert A. Richter, confirming into him title to a house located on the property and denying him all claim for any other compensation for the property and property rights expropriated in these proceedings, paying unto him the sum of $5,700.00.

By supplemental and amending petition it is alleged that Charles A. Patout and Lawrence C. Richard, defendants, acquired the land expropriated with full knowledge of the location of the proposed right-of-way and they are not entitled to receive any more for the property than its value at the time of public notice, October 9, 1959. The Department amends its prayer to ask for judgment against it for only $34,830.00, rather than the sum originally deposited.

In Suit No. 33,209 the defendant is Vermilion Development Company, Inc. The sum of $115,350.00 was deposited. On December 28, 1964 the Court allowed withdrawal of this amount by the corporation. The property involved in this taking is 2 tracts on which 5 houses were built, located in Richter Park Subdivision, Extension No. 2.

By supplemental and amending petition it is alleged that Charles A. Patout, Lawrence C. Richard and Eugene W. Patout, the officers of the corporation, had full knowledge of the location of the proposed highway and then constructed 5 buildings on the right-of-way and are, therefore, not entitled to compensation for these improvements, save the salvage value. The amount or deposit was reduced to the sum of $18,074.00, or a rebate of $97,276.00 asked.

Suit No. 33,292 was filed December 3, 1964 against Vermilion Development Company, Inc., wherein the sum of $575.00 as deposited was fair compensation. The suit has since been settled.

On June 5, 1968 the defendant, Albert A. Richter, sought to reenter these suits by way of intervention but these actions were dismissed on February 27, 1969.

Counsel for the Department has set forth a statement of facts which Counsel for defendant has concurred in so that view is accepted as correct and is, substantially, as follows:

The State of Louisiana, through the Department of Highways, under the authority conferred by Section 19.1 of Article VI of the Constitution of Louisiana, LSA, and the provisions of LSA-R.S. 48:441-460, filed suit for the purpose of expropriating property of defendants for highway purposes in the above captioned matters.

The above suits were consolidated for trial and

came on for hearing on the 21st day of June, 1965.

It was stipulated by and between counsel that a public notice of a public hearing to be held in Lafayette, Louisiana was published in The Advertiser, a Lafayette newspaper, on September 10, 1959; further that the public hearing regarding the contemplated construction of I-10 through the Lafayette area was held in Lafayette, Louisiana on October 6, 1959.

It was further stipulated that the salvage value of the 5 houses expropriated from Vermilion Development Company, Inc. was $17,760.00.

The property owned by defendants and involved in this case is located partly in the Richter Park Subdivision of Lafayette Parish, Louisiana, and partly in property located adjacent thereto and included in a proposed future extension of such subdivision. The property involved in Suit No. 33,209 is improved and the property involved in Suit No. 33,201 is unimproved. Plats of survey showing the properties involved in the taking are attached to both suits as Exhibit P-3.

Originally, A. A. Richter and Robert H. Richter owned a rectangular shaped tract of land containing 108.82 acres. They had a partition of this property with A. A. Richter taking the north one-half thereof and Robert H. Richter taking the south one-half. Shortly thereafter, and on the same day, September 16, 1958, both Richters entered into separate but similar development contracts with Charles Patout and Lawrence Richard under the terms of which they obligated themselves to sell their land to such developers at the rate of $2,000.00 per acre in exchange for the development of such land into a residential subdivision.

Contemporaneously with the above transaction, Richard, Charles Patout and his brother, Eugene Patout, created the Vermilion Development Company, Inc., which corporation was owned by the three men in the proportions of one-third to each. The corporation was to purchase property from the developers as lots and build homes on them which it was to sell to the general public.

The original plan was to develop the property covered by the development contracts in a prudent, orderly, and efficient manner. The first subdivision

created on December 3, 1958 was called Richter Park Subdivision and consisted of a street running north and south called Richter Drive with building plots on either side having dimensions of approximately 60 feet fronting on said street by a depth of approximately 105 feet. Approximately in the center of Richter Drive was Julie Drive, which began on the west line of Richter Drive and extended westwards. Richter Drive above and below Julie Drive was called North and South Richter, respectively. The plan operated as expected and in due time the lots in the subdivision were sold to the corporation who constructed homes on such lots and sold them to the general public.

In time, the need for additional lots arose and on September 11, 1959, Richter Park Subdivision, Extension No. 1 was created. Julie Drive was extended further westwards, and North and South Orleans Drive was created with lots on either side thereof similar in size and plan to that employed in the original Richter Park Subdivision. There was also created at this time, Covington Drive and Hammond Road at the north and south ends thereof respectively.

The same need for additional lots prompted the creation of Richter Park Subdivision, Extension No. 2 on February 22, 1962, with Julie Drive, Covington Drive and Hammond Road being extended still further westward and the creation of North and South May Drive as the main street of this extension. Lots size and shape were similar to the two preceding subdivisions.

Subsequent thereto Albert A. Richter and Robert Richter sold to Charles A. Patout and Lawrence C. Richard all of the property owned by them and located south of the proposed extension of West Julie Drive up to the railroad right-of-way so that at the time of the taking said purchasers owned all of the property located south of West Julie Drive.

During this period of time, Louisiana Highway No. 3052 (US 167) was created, being located just to the east of the Richter Park Subdivision complex. The interchange or intersection of this highway with the proposed Interstate Highway 10 was so located that the westerly leg

thereof, having a right-of-way 300 feet in width, extended into the Richter Park Subdivision to a point located midway between North May and North Orleans Drive or on a line running north and south and located on the rear or back lot lines of lots facing North Orleans Drive and North May Drive.

Properties owned by defendants herein and affected by such intersection was acquired from them by plaintiff by voluntary sales, copies of which are on file in these proceedings.

On January 29, 1963, Charles A. Patout and Lawrence C. Richard purchased from A. A. Richter, 61 lots, 6 of which were located in the Richter Park Subdivision, Extension No. 2, and 55 of which were located in the undedicated and unimproved portion of the Richter tract scheduled for eventual development as a residential subdivision. All of these lots, without any exception whatsoever, were located completely within or were partially affected by the right-of-way of Interstate 10.

Counsel for the Department argues that the defendants acquired knowledge of the location of the right of way prior to the taking, and in anticipation of that taking acquired from the owner just that property located within the right-of-way and, therefore, were unjustly enriched at the public expense. Bad faith is contended in its effort to deny to defendants the compensation they seek, or the amount first deposited when this suit was filed.

It is argued that the interchange or intersection of U.S. I-10 with La. State Highway 3052 (US 167) was located just east of the Richter Park Subdivision so the defendants realized that the price then being paid to landowners was good and they set about making plans to get as much money as they could when the State came to buy property for the Interstate continuation westward over and across this property. It is said in brief that defendants' maneuver was to gain the sympathy of this Court. Counsel argues further that a strip map of I-10 was supplied by the Department and was interlaid over a plat of the Subdivision enabling defendants to determine exactly where the highway would run. This was prior to 1964. Further, the Department asserts that the center line of the highway was established in March of 1959 by the placing of stakes which could be

clearly seen by all viewers.

The defendants asked the Department if it needed any further right-of-way as of August 5, 1961, but Counsel contends that this was "to complete the position of innocence of themselves" and that the reply by the Department which read in part as follows: "We do not contemplate the acquisition of any further right of way in your subdivision, for the proposed Lafayette Intersection," made it clear that the intent was of the intersection only.

Counsel then attacks the purchase by Patout and Richter of the 61 lots in 1963 as being an integral part of the scheme to unjustly enrich themselves at the public expense. They then knew, the Department says, that the highway was to occupy this identical area. The construction of the residential houses on 5 of these lots of a value above those in the general area is another indication of bad faith, suggests the Department. The construction of these houses commenced in March, 1964.

The testimony of Albert A. Richter is referred to in support of the State's position and he is quoted to say that Mr. Patout told him he wanted to buy the lots to make money on the Highway Department. This Mr. Richter, it is noted, is the same Albert Richter who settled his case with the Department and then attempted to intervene in these suits, making substantially the same contentions as the Department.

Defendants argue that they were guilty of none of the accusations made by the Department of Highways. They insist that they were acting in the normal and customary course of development in subdividing property for resale. They were, in fact, experienced men in the real estate business and had developed other subdivisions before. It is vehemently denied by Mr. Patout and all others concerned that they knew where the highway was to pass and schemed to unjustly enrich themselves by virtue of this knowledge.

Counsel for defendants argues that the Department knew just where the highway was to be but took no affirmative steps to prevent the defendants from developing the land adversely to their interest. Mr. Louis Smith, employee of the Department of Highways, stated that he ran the center line of I-10 through the subdivision area and

placed stakes every 100 feet some time in March of 1959 but permanent markers were only placed in the center of the railroad track to the west. He further stated that unless a person had access to field survey notes it would be difficult to locate these permanent markers. Neither the defendants nor their engineers had access to this information.

Mr. Frank Chachere, surveyor for the Highway Department, said that he saw about 2 blocks of the subdivision developed in 1959. He states that he sent this information to the Department.

Mr. Henry McBride, a right-of-way agent for the Department, stated that if construction is going on on the right-of-way it is usual to ask the owner to stop.

Mr. Robert Bethea, Assistant Right-of-Way Agent for the Department, states that the vicinity maps available in 1959 did not show the exact location of the proposed rights-of-way. He went on to explain that where construction is going on in an area contemplated to be taken that they attempt to notify the owners not to incur additional expense. There can be some purchasing before the project is approved but only in cases of protective buying where construction is known to exist or to be commenced or in hardship cases to protect the individual.

Mr. L. J. Lejeune, Review Appraiser for the Department, acknowledged that he had received a letter from Mr. Eugene Patout, President of Vermilion Development Company, requesting knowledge of the location of the right of way, and he had replied to the same. These letters are significant and are copied here in full.

"August 5th, 1961

Mr. Lejeune
Louisiana Department of Hwy.
Land Appraisal Department
Baton Rouge, Louisiana

RE: Richter Park Subdivision and
Richter Park Ex. #2
Lafayette, Louisiana

Dear Sir;

Due to contractual commitments on the above captioned subdivision(s), and work now being done not only by our corporation,but by the developers,Patout-Richard Agency, the time has come where it is imperative that we begin negotiations on any other right of ways that the state and/ or state-federal projects might intersect the above captioned property.

We will suffer grave damages in our development of the property unless we can effect sale to you on any other property which you might need for your projects.

Relocation of water lines, sewer lines, etc, on our part, and the possible relocation of streets (now being paved) as well as existing drainage and engineering could cause us irreparable harm.

We have been advised by our attorneys to notify you immediately of the situation as it exists today, and to request that you submit for an amicable settlement for future ROWs as a necessary expedient so that damages to us will be minimized.

Please acknowledge this letter by early mail, as it is impossible for us to stop our operations upon the ASSUMPTION that Interstate No. 10 MIGHT intersect our development.

Yours very truly,

VERMILION DEVELOPMENT CO. INC.

BY: /s/ EUGENE W. PATOUT
Eugene W. Patout, President

EWP/c''

"August 17, 1961

F.A.P. I-10-2(12) 101
STATE PROJECT 450-05-03
LAFAYETTE INTERSECTION
LA. 3052 INTERSTATE HWY.
LAFAYETTE PARISH

Mr. Eugene W. Patout
President
Vermilion Development Co., Inc.
122 N. Richter Drive
Lafayette, Louisiana

RE: RICHTER PARK SUBDIVISION &
RICHTER PARK EX. #2
LAFAYETTE, LOUISIANA

Dear Mr. Patout:

In reply to your letter - of August 5, 1961 - and also our telephone conversation this date, please be advised that I have discussed this matter with our Engineering Department and we do not contemplate the acquisition of any further right of way in your subdivision, for the proposed Lafayette Intersection. As far as can be determined, our Construction Plans are complete and we have - as of this date - acquired all right of way necessary for the construction of this project.

If we can be of any further assistance to you, please feel free to call upon us.

Yours very truly,

/s/ L.J. LEJEUNE
L.J. LEJEUNE
REVIEW APPRAISER

LJL/mep"

Having heard nothing from the Department subsequent to this communication, 5 homes on the 2 tracts involved in Suit No. 33,201 were begun in March and April of 1964. Mr. Patout stated that they were constructed because he felt the market was such that this type home could be sold. In July of 1964 he was told by Mr. Maurice Chappuis, one of the appraisers for the Department, that the highway was to come through Richter Park. At this time the fifth home on these five lots was possibly 95% completed. Mr. Chappuis advised him that someone from the Highway Department would contact him and Mr. McBride later on did contact him. He thereupon discontinued all construction in the subdivision, and within the limits which he then understood the highway would encompass. After he received the July 24, 1964 letter from Mr. Cope, he states that he discontinued operations but immediately started new construction in a different area of the subdivision. These houses were in the price range of $20,000.00 and upward.

The July 24 letter referred to above reads as follows:

"July 24, 1964

STATE PROJECT NO. 450-04-03
F.A.P. NO. I-10-2 (12) 101
LAFAYETTE - INTERSECTION - La 3052 Highway
ROUTE I-10
LAFAYETTE PARISH

Vermilion Development Company, Inc.
100 North Richter Drive
Lafayette, Louisiana

ATTENTION: Mr. Eugene W. Patout,
President

Dear Mr. Patout:

As you have previously been advised by Mr. Henry H. McBride of our Lafayette District Office, the Department is

contemplating the acquisition of property for the above captioned project in the near future. This project will involve the construction of a portion of Route I-10 through Richter Park Subdivision within the confines of your ownership.

We are not concluding our survey of the area required from your ownership. Survey crews on the ground are taking topograph and this, when plotted, will complete the property map of Richter Park. We also have professional Real Estate Appraisers in the area developing the necessary data to finalize an appraisal of the area required from you.

It is anticipated that all data will be processed in sufficient time to permit us to begin formal negotiations about August 1,1964. This, of course, is a tentative date assuming development of no unusual difficulties.

Inasmuch as the development of a complete survey map and appraisals of a highly developed area such as Richter Park is a very complex operation, we request that you delay construction of additonal improvements within the required area until negotiations for the required area can be concluded. We will, of course, expediate our acquisition process as much as possible in this instance.

Your cooperation in this matter will be greatly appreciated. Should you desire any additional information in connection with this project, please do not hesitate to call on us.

Yours very truly,

/s/ GENE N. COPE
GENE N. COPE
SENIOR RIGHT OF WAY AGENT

GNC:sbz''

In support of its contention that a landowner who places improvements on property condemned after the project has been proposed should not be allowed to colect compensation for the improvements, the Department correctly cites the law. In particular, it refers to 27 Am. Jur. 2d. p. 105, wherein the general rule is stated and where a person has acted in bad faith compensation should be denied.

Considering the chronology of events leading to this controversy and all of the evidence presented on both sides I do not believe the defendants in these cases have acted in bad faith.

The case of Shreveport Traction Company vs. SVRA, 133 La. 900, 63 So. 396 (1913) has been cited by the Department but, as pointed out by Counsel for defendants, is distinguishable as there would be no increase in the market value of a residential subdivision merely because of the proximity of this highway.

In the case of State vs. Laird, 219 La. 567, 53 So. 2d. 567 (1951) the defendant had been notified that the suit was pending before he constructed the garage and, therefore, he was not entitled to recover its value.

Despite the fact that there was a public notice in 1959 concerning I-10, I do not believe the evidence clearly reflects that these defendants knew the exact location of the proposed highway. From the communicatons that have been referred to, it seems that these people did what they could to ascertain its whereabouts so as to protect themselves. Immediately upon being told or warned about the construction, they ceased operations in that respect and moved on into other areas of the subdivision. I do not believe their overall conduct depicts a scheme with the ultimate purpose of enriching themselves at the public expense. Therefore, the first issue presented to the Court in this litigation, i.e. the denial of compensation on the basis of unjust enrichment will be denied. The evidence is not clear and convincing and to a legal certainty that these persons were guilty of bad faith as alleged.

II

In Suit No. 33,201 the property is 16 separate parcels of land, except the parcel owned by Albert A. Richter which suit has been settled. The Department contends that this property is raw acreage and does not form a part of a dedicated subdivision. Counsel states that the true value of the property is its market value as of the date of the expropriation proceedings and in the condition in which it then stood, citing Parish of Iberia vs. Cook, 238 La. 697, 116 So. 2d. 491 (1959).

The defendants contend that the value of the property amounts to $184,102.18, together with the sume of $338,356.36 as severance damages.

As appraisers for the Department, Mr. Maurice Chappuis and Mr. Stanley Tiger testified. Their conclusions are as follows:

Appraiser	Land Value (part taken)	Damages	Total
M. Chappuis, Plaintiff	$ 46,700.00	$13,360.00	$60,060.00
S. Tiger, Plaintiff	50,360.00	16,773.00	67,133.00

Mr. Maurice Chappuis, a real estate appraiser in Lafayette Parish and recognized by this Court as being an expert in the field and oftentimes seen in courtrooms, appraised the property owned by Vermilion Development Company and by Patout and Richard. He originally started work on this project in early July of 1964. Mr. Chappuis agreed the highest and best use of the property was for subdivision purposes.

For valuation based on the whole property, Mr. Chappuis calculated that 13,339 acres had a value of $3,500.00 per acre, or $46,700.00. 36.33 acres remained and upon this he placed a severance damage of $13,360.00, making an overall total of $60,060.00. Mr. Chappuis used 9 comparable sales, covering a period from 1960 to November, 1963, ranging in area from 7.6 acres to 20 acres and with a price range from $1,250.00 per acre to $3,361.00 per acre. This appraiser assessed the severance damage on the whole property concept for the following rea-

sons: "The severance damage is due entirely to the north remainder which will have a very irregular shape as may be observed by viewing the exhibit in the Addenda. The portion remaining on the immediate edge of the right-of-way will have the most damage as part of the whole due to its size and shape. The remaining portions will suffer due to being more isolated and being irregular in shape, however, due to its small but usable size will not suffer more than the $1,000 damage allocated to it."

Valuation based on a separate entity, he valued the lineal foot of the property at $14.00 per front foot for 3275.73 feet, or $45,860.22. For the 10.896 acres of the commerical tract, he values it at $13,000.00 per acre, or $32,688.00, making a total of $78,550.00 before taking. The value of that taken is $42,050.00, plus severance damage of $15,600.00, or a total of $57,650.00.

Mr. Stanley A. Tiger, Realtor-Appraiser, Crowley, Louisiana, was also used by the Department in placing a value on the property acquired in Suit No. 33,201. Mr. Tiger concluded that the highest and best use was for residential subdivision. He concluded that the value of the property taken was $50,360.00 and the severance damage was $16,773.00, or a total of $67,133.00. He used 8 comparable sales in the area to arrive at this figure. These comparables range from a period of 1960 through 1963. The area range is from 8.96 acres to 25.6 acres, with a value ranging from $1,250.00 per acre to $3,750.00 per acre. The severance damage is determined by Mr. Tiger as follows: "This area, although shown as lots on the development plat of said subdivision, is undeveloped land in cultivation and or pasture. Thoughtful consideration was given by this appraiser to the anticipated use or development method, however a comprehensive study of acreage sales would in my opinion reflect the market value with reference to the accepted definition of market value. A study of such sales are attached hereto and made a part of this report. After the proposed taking and construction there will be two remainders, one to the north of the proposed right of way containing 10.33 acres and one to the south of the right of way containing 26.0 acres, a total remainder of 36.33 acres. The area to the north of the right of way due to its jagged or irregular plottage

will in my opinion have a diminution in value of approximately 50%. The area containing 26.0 acres to the south will in my opinion retain its unit value after the proposed taking and construction. Although the plottage has changed some, the smaller tract would in my opinion more than off-set this factor."

The defendants had as their appraisers, Mr. Allen J. Angers, Realtor and Appraiser of New Iberia, Louisiana, and Mr. Dan A. Ritchey, Jr., Realtor of Lafayette, Louisiana. Both of these gentlemen are well experienced.

Mr. Allen Angers considered the highest and best use of the Richter Park Subdivision and Extension No. 2 to be for single subdivision development. Taken for the highway are 16 separately described tracts of land. In addition, there are two adjoining tracts which lie west of Richter Park between this subdivision and the railroad to the west which he considers potential subdivision acreage of an area of 17.396 acres. This latter portion is vacant and used presently for agricultural purposes and not platted with restrictions imposed. By virtue of the taking the Richter Park Subdivision actually has been cut into two portions, that lying south of the right-of-way which would include almost all of the residences already constructed.

The potential subdivision acreage, included in the taking, which lies west of the Extension No. 2 includes 5.2 acres. This severs a commercial tract into two parts, being north and south of the right-of-way. The southern part will continue to have subdivision potential, whereas the north will not.

Mr. Angers used comparables of land sold in subdivisions which he considered comparable to the subject land. They are Martin Oaks Subdivision, Moreland Heights Subdivision and Coulee Shore Subdivision. One sale in the Martin Oaks Subdivision was in 1964, a lot 75 x 138 feet for $2,500.00, or $33.33 per front foot.

Five sales in the Moreland Heights Subdivision were considered, three in May of 1964 and two in September of 1964, with an average of approximately $27.00 per front foot. Five sales in the Coulee Shore Subdivision were considered, being dated 7-18-63, 1-6-64, 1-17-64, 3-31-64 and 7-12-64. The average cost was approximately $21.00 per front foot.

From these Mr. Angers estimates that all lots in the Richter Park Subdivision, with all off site improvements in place, would command a price of $.28 1/2¢ per square foot. Those remaining without street, water and sewerage are valued at $25¢ per square foot. The total is $74,724.00. The severance damage to the remainder of the lots taken Mr. Angers determined on a direct basis using the diminution in value per square foot to develop the amount. This computation is outlined in detail in his report and will not be copied here in its entirety. The total amounts to $11,483.00.

To arrive at a fair market value of the area of potential subdivision which lies to the west of the Richter Park Subdivision, as hereinabove mentioned, 11 comparable sales (4 were eliminated) were used of acreage transfers in the vicinity, dating from the year 1962 into January of 1965, at an average cost of $3,226.00 per acre. Since the potential subdivision acreage within the right-of-way was 5.216 acres, this amounted to $16,691.00. (By amended report Mr. Angers increased his appraisal of the 5.216 acres and the 8.26 acres to $5,701.00 per acre.)

Severance damage to the northern remainder (that portion not owned in fee but covered by the contract discussed later) was considered because of its physical separation from the Richter Park Subdivision. Mr. Angers approached this problem by the use of a subdivision residual, taking the gross sales expectancy less developing costs and then deducting the cost price at $2,000.00 per acre (19.5 acres), leaving a net amount of $148,221.00. Taking from this the net value due to the owners 5 years hence which it would take to place the property into development position, or $81,620.00, leaving a value of $27,601.00 which he considers the severance damage attributable to the taking and the construction of the highway. The computation is shown as follows:

SUBDIVISION RESIDUAL NORTH REMAINDER

Gross Sales Expectancy

7279 FF Lots X $30. = $218,370.00

Less Development Costs:

5260 LF Sts @ $6.00 =	$31,560.	
4680 LF Collection Line @ $1.	4,680.	
4680 LF Walter Lines @ $1:	4,680.	
Water wells est. $3000. =	3,000	
Engineering 10% of $43,920.	4,392	
Sales 10% of $218,370. =	21,837.	
All Costs		$ 70,149.00
Net Sales Expectancy		$148,221.00

$\frac{\$148,221.}{19.5 \text{ Ac}}$ = $7601. per Acre

Less Land Cost 19.5 Ac. X $2000. =	(-)	39,000.00
		$109,221.00
Current Net to Patout & Richard	$109,221.00	
Present worth 5 Yrs. hence at 6% Factor .7473 X $109,221. =	81,620.00	
Severance Damages Richter Park	$ 27,601.00	

As to the acreage lying north of the highway, which is 8.26 acres owned in fee, at $3,200.00 per acre, the pertinent portion of his report is as follows:

> "I believe that this property, too, will require a delay of 5 years to return it to the position which it enjoyed immediately prior to the taking and have calculated the severance damages of this remainder on the same basis which is to say the present worth of $26,432.00 payable 5 years hence at 6% interest, the calculations for this portion of the property are as follows:

Current Value Potential Subdivision Acreage Northside 6.5 + 1.78 Ac = 8.26 Ac. ¼ $3200. =		$26,432.00
Present worth 5 Yrs. hence at 6% Factor .7473 X $26,432. =	(-)	19,753.00
Severance Damages to Subdivision Acreage		$ 6,679.00 "

Mr. Ritchey determined that the highest and best use of the property was for resudential homesites. In order to determine the market value of the lots taken Mr. Ritchey also used comparable sales in neighborhood development areas, the same areas as Mr. Angers, arriving at a conslusion that the property was worth $30.00 per front foot. This included all off site improvements, such as water, lights, sewerage collection lines, gas and blacktop streets. Mr. Ritchey went about valuing the front footage differently for various lots totally taken within the subdivision property, depending upon what off site developments were available, arriving at a figure of $132,314.10. Using the same basis of value for the property partially taken, he arrived at a total of $4,-051.06, or a total of $136,350.00.

In considering the severance damages Mr. Ritchey used two approaches to the problem, defined as follows:

"Premise One: is to consider all homesites, whether presently platted and/or ready for construction or not, and to estimate the respective total values before the taking and compare this to the total value replatted after the taking.

Premise Two: is to follow the same procedure as Premise One for those lots owned in fee by defendants and additionally to consider the Rights involved North of the barricade not owned in fee as 'property' owned under the development contract. This can be measured by estimating the market value of the remaining unsold land covered by the contract as of the date of the taking, less the stipulated amount payable to the land owner, as compared to the market value of same 'after the taking.'"

In Premise One, he concluded that the severance damage suffered amounted to $77,071.94. Under Premise Two the severance damage amounted to $72,151.94.

As to the area considered as prospective subdivision land (argued by the Department to be nothing more than raw acreage), the evidence indicates that it was

to be developed piece by piece, that the subdivision purposes was reasonably prospective, not speculative, so should be valued as subdivision property. State, Department of Highways vs. Mouledoux, 200 So.2d. 386 (1967). Writ refused, 251 La. 36, 202 So.2d. 653 (1967).

Considering the testimony and the extensive reports of the four appraisers, all being especially well qualified in the field, I am going to accept the first calculations of Mr. Angers as representing fair value and just compensation within the meaning of the laws and the jurisprudence of this State.

In Suit No. 33209, the claim of Vermilion Development Company, we are concerned, really, with land values and value of improvements. There are no severance damages. The conclusion reached by the several appraisers is shown as follows:

Appraiser	Land Value	Improvements	Damages	Total
M. Chappuis, Plaintiff	$11,040.00	$113,510.00	None	$124,550.00
S. Tiger, Plaintiff	10,350.00	105,000.00	None	115,350.00
D. Ritchey, Defendant	10,350.00	129,925.00	None	140,275.00
A. Angers Defendant	10,350.00	129,953.00	None	140,303.00

Basically, the Department contends that the improvements on the property represent an over-improvement for the subdivision.

Mr. Chappuis, for the Department, considered the highest and best use of the property as residential home site. He leaned heavily upon the market data approach in arriving at a value and used comparable sales to show what houses of the type involved were selling for. Five other subdivisions of similar nature were used. Also by the use of comparable land sales it was a considered opinion of the appraiser that the value of the lots in the developed state would be $32.00 per front foot. Each of the individual five houses was considered as a separate

entity, considering other houses in the area of similar design. His report is in great detail and cogent explanation used for his conclusions. A break down is as follows:

Lot 168 and part of 169	
Land	$ 1,920.00
Improvements	21,580.00
Lot 173 and part of 174	
Land	$ 2,080.00
Improvements	23,420.00
Lot 174 and part of 175	
Land	$ 2,240.00
Improvements	23,760.00
Lot 176 and part of 175	
Land	$ 2,400.00
Improvements	22,800.00
Lot 177 and part of 178	
Land	$ 2,400.00
Improvements	21,950.00
Total	$124,550.00

Mr. Stanley Tiger considered the highest and best use as residential home site. He estimated that the five lots involved had a value of $30.00 per front foot, or a total of $10,350.00 and that the estimated value of the improvements was $105,000.00. The comparable sales were of properties situated in other subdivisions as well as five sales in the Richter Park area.

For the defendants Mr. Allen J. Angers and Mr. Dan A. Ritchey were again used. Mr. Angers concluded that the highest and best use of the property owned by Vermilion Development Company, Inc. was for single family residential property. He considered comparable sales of property located in the Martin's Oak Subdivision, Moreland Heights Subdivision and the Coulee Shore Subdivision, being 12 transactions, and arrived at a conclusion that the market value of the property as of the date of the expropriation was $30.00 per front foot, or a total of $10,350.00. He used a cost approach (PAGE 29) to value the single family residences located on this property at 10% for overhead and profit and arrived at the following:

Residence on Lot # 168	$25,560.84	
Residence on Lot # 173	26,267.94	
Residence on Lot # 174	28,640.19	
Residence on Lot # 176	25,462.32	
Residence on Lot # 177	24,022.22	
Total all building improvements		$129,953.51

Thus, the total value amounted to $140,293.51.

Mr. Angers concluded there were no severance damages involved.

Mr. Dan Ritchey agreed that the highest and best use of the property was for single family residences. Mr. Ritchey went to some length to describe the type of structures placed on the properties for residential use and stated that the cost approach was the most applicable to determine fair value. Based upon the market data approach to the lot values he concluded that the lots with water available from a franchised subdivision system, blacktop streets and sewerage collection at a market value of $30.00 per front foot. He used as comparable sales to reach this conclusion those in the three subdivisions mentioned by Mr. Angers. His overall conclusion is as follows:

Cost Estimate of House and Lot No. 168	
Quantative Cost Estimate	$25,560.84
Lot Value from Market Data	1,800.00
Total Value by Cost Approach	$27,360.84
Cost Estimate of House and Lot No. 173	
Quantative Cost Estimate	$26,267.94
Lot Value from Market Data	1,950.00
Total Value by Cost Approach	$28,217.94
Cost Estimate of House and Lot No. 174	
Quantative Cost Estimate	$28,640.00
Lot Value from Market Data	2,100.00
Total Value by Cost Approach	$30,740.00
Cost Estimate of House and Lot No. 176	
Quantative Cost Estimate	$25,462.32
Lot Value from Market Data	2,250.00
Total Value by Cost Approach	$27,712.32
Cost Estimate of House and Lot No. 177	
Quantative Cost Estimate	$24,022.22
Lot Value from Market Data	2,250.00
Total Value by Cost Approach	$26,272.22

No severance damage allowed.

I accept the appraisal of Mr. Maurice Chappuis outlined above as representing fair compensation to Vermilion Development Company, Inc. and allow the amounts therein set forth.

The 19.5 acre tract mentioned above which remains to the north of the right-of-way is not owned in fee by Patout and Richard but is subject to a contract of September 16, 1958 by the owners, Albert and Robert Richter, to convey to Patout and Richard all acreage required for subdivision lots at the rate of $2,000.00 per acre. It is actually an agency contract and irrevocable under its terms. It terminates when the last lot is sold. I believe, therefore, that the damages suffered are actually suffered by Patout and Richard.

Vermilion Development Company, Inc. asserts in its answer a claim for damages occasioned to a partially completed home on Lot 464, located north of the highway, in the amount of $18,244.00. It is alleged that this damage resulted from nonaccessibility of the land because of the taking of the highway in this and other suits. The sum of $2,394.00 is also asked for a warehouse constructed on Lots 38 and 39 for the same reason plus damage to the structure and lots in the amount of $1,750.00.

The evidence reflects that there will be an access road to these lots within two years from the date of the taking. Both Mr. Ritchéy and Mr. Angers stated that the loss will be occasioned by the depreciation in value over the two year period before the residence can be completed. Mr. Angers, using a cost approach, considered the value two years hence would be 75% of its cost of $10,800.00, or $8,100.00. To discount this value two years hence he used a deferral factor of 6%, or $7,209.00 which, taken from the value at the time of the taking, leaves a damage of $3,591.00. This is a realistic approach and is accepted. The evidence does not support a claim of severance damages to Lots 38 and 39.

III

Judgment will, therefore, be rendered in Suit No. 33,201 in favor of Charles Patout and Lawrence Richard

in the amount of ONE HUNDRED THIRTY SEVEN THOUSAND, ONE HUNDRED SEVENTY EIGHT AND NO/100 ($137,178.00) Dollars.

In Suit No. 33,209 judgment is rendered in favor of Vermilion Development Company, Inc. in the amount of ONE HUNDRED TWENTY EIGHT THOUSAND, ONE HUNDRED FORTY ONE AND NO/100 ($128,141.00) Dollars. Defendants' reconventional demand is dismissed.

In Suit No. 33,292 judgment is rendered in favor of Vermilion Development Company, Inc. in the amount of FIVE HUNDRED SEVENTY ONE AND NO/100 ($571.00) Dollars.

All costs to be paid by the Department, including fees for Mr. Dan Ritchey in the amount of $2,000.00, plus $200.00 for court attendance; for Mr. Allen Angers, $2,000.00, plus $200.00 for court attendance; and Mr. Roland A. Laurent, engineer and expert witness, $575.00, plus $100.00 for court attendance.

Separate judgments in each of these consolidated cases will be signed upon presentation.

RENDERED at Crowley, Louisiana, this 18th day of July, 1969.

DISTRICT JUDGE

STATE OF LOUISIANA

COURT OF APPEAL

THIRD CIRCUIT

STATE OF LOUISIANA, THROUGH
THE DEPARTMENT OF HIGHWAYS,
Plaintiff-Appellant

VS.

CHARLES A. PATOUT ET AL. NO. 3014
Defendants-Appellees

STATE OF LOUISIANA, THROUGH
THE DEPARTMENT OF HIGHWAYS,
Plaintiff-Appellant

VS.

VERMILION DEVELOPMENT CO., INC. NO. 3015
Defendant-Appellee

(Two cases consolidated
for appeal)

* *

Devolutive appeal from the Fifteenth Judicial
District Court of the State of Louisiana, in
and for the Parish of Lafayette;
Honorable Charles T. Everett, Judge

ORIGINAL BRIEF
ON BEHALF OF THE STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF HIGHWAYS, PLAINTIFF AND APPELLANT.

* *

D. ROSS BANISTER
JOHNIE E. BRANCH, JR.
CHESTER E. MARTIN
Attorneys for Plaintiff and Appellant

SYLLABUS

1. A landowner who buys land or makes improvements within an area he knows will be required for a public improvement is entitled to be compensated for the land at an amount no greater than he paid and to be compensated for the improvement at an amount no greater than the salvage value of the improvements.

State v. Laird, 219 La. 567, 53 So. (2d) 674, 676, 677 (1951)
Eminent Domain, § 294 27 Am. Jur. (2d) 105-106
Eminent Domain, § 175 (1), 29-A C.J.S. 748

2. Land which is available and in demand as a subdivision must be valued in the condition in which it was taken and as it would be bought by a developer.

Parish of Iberia v. Cook, 238 La. 697, 116 So. (2d) 491 (1959)

3. Damages cannot be awarded to a landowner on land which he does not own, since suit can be brought only against "owner" and only the "owner" is assured just compensation.

LSA-R.S. 19:2
Art. 1, Sec. 2, Louisiana Constitution of 1921
Art. 1, Sec. 19.1, Louisiana Constitution of 1921

4. Damages to remaining land cannot be based on speculation as to delay in use but must be based upon a before and after valuation.

State v. Mason, S. Ct. November 10, 1969 (Not reported)

5. An award cannot be made in an expropriation suit for damage to property not involved in the suit.

State v. Mouledous, 199 So.(2d) 185, 192-193 (1967)

STATEMENT OF THE CASE

(Page numbers used, unless otherwise indicated, are those used in the transcript of testimony)

The State of Louisiana, through the Department of Highways, expropriated certain property in the Parish of Lafayette for the construction of Interstate Highway I-10, which is a new highway across the southern part of the State and running the entire width of the State.

There were three suits filed, one against Charles A. Patout, Lawrence C. Richard, and Albert Richter, and two against Vermilion Development Company, Inc., which corporation was owned by Charles A. Patout, his brother, Eugene Patout, and Lawrence C. Richard. (The first and last named being the defendants in the first suit).

The three suits were consolidated for trial which was assigned for June 21, 1965. On that date one of the suits against Vermilion Development Company, Inc., was settled and the other two suits went to trial, one against Patout and Richard, Docket No. 33,201, and the other against Vermilion Development Company, Inc., Docket No. 33,209, and the Department's appeal of the two cases tried remain consolidated.

To aid the Court better to understand these cases and the State's appeal from the trial court's judgments, certain summary information is furnished here in a tabular form:

Docket	Filed	Defendant	Deposit, estimated just comp.	Demand	Award
33201	11/12/64	Charles A. Patout et al.	[1] 58,800.00	[2] 522,458.54	137,178.00
33209	11/18/64	Vermilion Dev. Co., Inc.	115,350.00	155,900.00	[3] 123,141.00

These two suits were amended by plaintiff for reasons explained later in this Statement of the Case and the Argument.

33201	4/17/65	Charles A. Patout et al.	34,830.00	Unchanged	Unchanged
33209	4/19/65	Vermilion Dev. Co., Inc.	18.074.00	Unchanged	Unchanged

1 The deposit was actually $64,500.00 but by joint petition and judgment Albert Richter's interest was settled by his withdrawal of $5700.00 and this ended his participation in the suit except for a later attempt to intervene, which failed.

2 Plaintiff filed a peremptory exception denying defendants right to claim to $206,025.12 as damages to property, upon the ground that the property was not owned by the defendants who claimed in paragraph 5 of their answer. The merits were not expressly judged in the trial court other than the trial court's making an award on this item of $27,601 (pp. 17-18 of Reasons), based upon the defendants' testimony.

3 Based on the state's testimony (pp. 21 & 23 of Reasons) of $124,550.00 and on defendants' testimony (pp. 23 & 24 of Reasons) of $3591.00, which was admitted as a proffer but was never accepted by the court until it was included, without comment, in the award (see pp. 109,210-211,215 and 512-513 of Testimony).

The first and most serious question facing this Court is a determination of the effect of the fact that the defendants bought the property expropriated only after having their own engineer project lines on a map to show what would fall within the proposed right-of-way, which they then purchased and upon which they then built five houses.

Although various personnel of the Department had various bits of information which, when assembled, led to the conclusion that defendants bought and built within the proposed highway with full knowledge that the Department would require the area for the proposed highway construction, this was not known to the Department's attorney when he filed the two suits in November, 1964, and when he did learn this, amended petitions were filed in April, 1965, alleging generally that because of defendants' previous knowledge, they were entitled to no more than they had paid for the land taken, which they had acquired January, 1963, and the salvage value of the improvements built upon part of the land in March and February, 1964, just a few months before it was expropriated.

The Department's position is predicated upon the well established principle that a claimant is obligated to minimize his damage and that he may not deliberately engage in activities in relation to land he knows will be required for highway construction, either by purchase

or by construction, so as to increase the cost of the highway contruction to the public.

The defendants' objection to this was sustained by the court but was admitted as a proffer (p.235).

The Department is in substantial agreement with the trial court's summary of the facts and contentions through p. 11 of the court's Reasons for Judgment.

The substance of the Department's position is that the defendants knew with a high degree of certainty exactly where the proposed highway would be constructed and that they deliberately went about acquiring the land involved and constructing five residences on five lots they acquired. The Department's position is then that the defendants can claim no more than reimbursement for the land on the basis of their purchase price and that they can claim no more than the salvage value of the improvements they constructed on the land they acquired with knowledge that it would be taken for the highway.

The defendants' position seems to be a mixture of contention that: (1) they did not know where the highway right of way was to be; that, (2) the Department in some way misled them as to the proposed location of the right of way, though they never suggested any reason for this deception by the Department; and that (3) the Department neglected to warn them to stop the construction, though their own testimony shows clearly that the construction was a forced draft operation in a very short period of time, quite clearly planned for completion before the Department could learn of it and take action to stop it.

The trial court held that the Department's position is correct, and is set out in 27 Am. Jur.(2d) 105. The Court apparently agrees with the Department's contention as to the measure of just compensation as set out in the amended petitions, if ".....the defendants in these cases have acted in bad faith." (p. 12 of Reasons).

The trial court concluded that the defendants did not act in bad faith and then turned to the question of fixing just compensation which would be due if the defendants had acted in good faith.

Thus, the first question to be decided by this Court on appeal is the good faith of the defendants in buying and building within the right of way of the pro-

posed highway or, said another way, did they do this with full knowledge?

To determine this question will require a review of the testimony, which is made below, after the reading of which I feel sure this Court will agree with the Department that the defendants bought property and built within the area involved with full knowledge that it was within the right of way of the new highway. If the Court agrees with the Department on this, it will then, it appears, have no alternative but to fix the award at the amended values submitted by the Department. If this Court disagrees with the Department, it will then go on to consider the determination of just compensation outside the question of bad faith of the defendants.

I here summarize the facts relied upon by the Department to show the bad faith of defendants:

1. The advertising and holding of a public hearing on the construction of the proposed highway on October 6, 1959, was stipulated (p. 3 of Reasons) and the purchase of the lots involved was made January 29, 1963 (p. 5 of Reasons) and the five houses were constructed in March or April, 1964 (p. 230 of Testimony).
2. The location of the new highway was made known by radio, newspapers and public hearing (p.35) and a map was displayed showing approximate location of highway (pp. 35 and 36).
3. Defendants' engineer, Laurent, admitted he was employed by defendants in 1961 to determine and locate on the subdivision map, where the highway would be located (p. 153).
4. Defendants' engineer admitted he knew that the interchange at La 3052 meant there would be a highway constructed westerly (p. 168).
5. Defendants' engineer admitted he plotted the proposed highway on the subdivision map from a highway map furnished to him by the defendants (pp. 169, 170, 190).
6. Defendants' engineer admitted he plotted the the projected highway for the defendants in

1961 (p. 172).

7. Defendants' engineer admitted he knew and told the defendants (in 1961) that he new highway could not vary substantially from his projection (pp. 173 and 181) and this turned out to be true (p. 174).

8. Defendants' engineer gave copies of map, showing projection, to defendants (p. 181).

9. Eugene Patout (defendant) admitted talking to his engineer about extending highway lines from highway map in 1961.

10. Defendant Eugene Patout claimed that the first information he had about where the highway would be was in July, 1964 (p. 231).

11. Defendant Eugene Patout admitted he built the five houses in March and April, 1964 (p.230) but also admits that when they were expropriated he began the construction of other houses, none of which were completed a year later (p. 233).

12. Defendant Eugene Patout sold first property in subdivision to Department in 1961, at which time he apparently got map showing additional takings to be made (p. 276).

13. Defendant Eugene Patout admitted he had his engineer extend lines of highway through subdivision in 1961 (p. 284) and claimed that his purpose was to avoid it. (p. 285).

14. Defendant Eugene Patout admitted that he knew he was building the five houses within the right of way of the highway as projected by his engineer, Laurent (p. 286).

15. Defendant Eugene Patout admitted that the purchase of the 61 lots was a departure from their customary subdivision development, and defendants' objection to this line of questioning was sustained but proffer was permitted (p. 291).

16. Defendant Eugene Patout claimed he acquired the 71 lots (almost exactly falling within the right of way diagonally across the subdivision) so that he could build more expensive houses away from the cheaper houses (p. 292).

17. Defendant Charles Patout admitted employing the engineer, Laurent, to extend lines of new highway in 1961 (pp. 326, 327 and 330).

18. Defendant Charles Patout admitted he suspected the possibility that the 61 lots he bought were within the right of way of the new highway (pp. 328-329).

19. Defendants agreed with vendor of lots to move his house, which was on one of them and within the highway right of way (pp. 334-335).

20. Defendant Richard admitted they bought the 61 lots within the confines of the projection done on the map by the engineer, Laurent. See D-19. (pp. 343-344)

21. Richard admitted he knew the location of I-10 when he repurchased the 56 lots (p. 348)

22. Richard admitted that P-25 is letter dated 1/29/63 indicating he knew lot 299 was within highway right of way (pp. 347-349).

23. The State's employee who was responsible for the survey of the highway placed a stake on the center line in 1959 at each 100 feet (pp. 642, 645, and 646).

24. Another of the Department's surveyors found the center line well marked with red and yellow flags and stakes so that an engineer would have had no difficulty in locating it (pp. 653-654).

25. A surveyor would have had no difficulty in locating the center line of the highway (pp. 656-657).

26. Defendants' purchase of the 61 lots was a total departure from past practice, which had been to purchase one lot at the time and never more than 20 (p.661). (Comment: obviously previous purchases had followed the plan of orderly development and the purchase of the 61 lots equally obviously was not in accord with orderly development, but was only the purchase of the lots within the highway right of way).

27. Defendants told vendor of 61 lots that they were

buying the lots within the right of way (p. 661) and explained that the reason for buying so large a number was because "..... they wanted to make some money on the Highway Department" (p. 667) and told him they would pay for the lots when the Department bought them. (p. 666).

28. Vendor of lots showed the highway stakes to defendants before they bought the lots (pp. 663-664).

29. Defendants sold lots to State in 1961 and said they knew where the right of way was at that time (p. 669, 676).

30. State's surveyors worked along the line of survey every year from 1958 to 1964 (p. 677).

31. Defendants agreed to move vendor's house out of the right of way (pp. 662-663) but tried to back out (p. 678).

32. Defendants had a scheme for getting additional profit from the public by building a sewer plant within the right of way (p. 668).

33. Defendants admitted to an employee that they knew the location of the right of way (p. 690) and that they knew that the statement from the letter (D-3) from the Department, indicating that no more right of way was needed, applied only to project for the interchange (pp. 689, 692-693).

34. Department's employee responsible for the right of way appraisal learned for the first time in June, 1964, that the five new houses had been built within the highway right of way. (p. 696).

35. The defendants, through their corporation, Vermilion Development Company, Inc., one of the defendants here, earlier sold Parcels 6-2 and 6-5 to the Department, which were house slabs on Lots 67 and 69, on the line marking the westerly limits of the Department's land acquisitions for the interchange connecting State Route 3052 (now La-US 167) to I-10). See sheet No. 6, 2nd sheet of Exhibit P-3.

All of the above applies equally to both cases on appeal.

Now, in the alternative, assuming, for our purpose here, that this Court has agreed with the trial court's finding that the defendants did not act in bad faith, we are then confronted with an ordinary problem of fixing just compensation based primarily upon market value of the property expropriated or damaged by the expropriation.

This valuation problem can best be discussed separately as to the two cases, and should be approached by reference to the above table.

Although the Department's original deposit in the Charles A. Patout et al. Case, District Court Docket No. 33,201, was $64,500.00, one defendant, Albert Richter, withdrew in a joint petition for final judgment based upon the deposit for his interest of $5,700.00, and he is no longer in this suit, though he later unsuccessfully attempted to intervene. Thus, the original deposit by the Department for the interest of the two remaining defendants, Charles A. Patout and Lawrence C. Richard, is $53,800.00.

Reappraisals of the property expropriated from the two remaining defendants resulted in an increase of the estimate of value from the net of $58,800.00 to $67,133.00 by Stanley Tiger and $73,755.00 by Maurice Chappuis, appraisers employed by the Department, and these appraisals were the State's testimony on values.

Although I have absolutely no doubt that the Court's constitutional right and obligation to fix just compensation leave it free to fix that compensation at an amount lower than that given in the testimony of the highest amount by an appraiser for the State, I will do no more here than explain that amount as the highest possible figure.

Thus, I will analyze Mr. Chappuis' appraisal, the highest given by the State, and compare it with that fixed by the trial court based on the testimony of Mr. Angers, defendants' appraiser, and the results of the testimony of both will be set out later in tabular form.

Mr. Chauppuis' appraisal differs in a major respect from that of Mr. Angers in that Mr. Chappuis valued the property west of the westerly lines of Parcels No. 6-34,

6-35 and 6-36 as acreage with a highest and best use for potential subdivision development and he rejected the idea that it had become a subdivision by mere incorporation on a map as a subdivision but was not otherwise developed (pp. 753-754).

Mr. Angers treated Parcel 5-18 as the only potential subdivision area taken and treated Parcels 6-30, 6-23, 6-31, 5-21, 5-22, 5-23 and 5-24 as developed subdivision lots with a slightly lesser value per square foot than the completely developed lots.

In an effort to facilitate the Court's consideration of the value conclusions given by the Department in its highest appraisal, made by Mr. Chappuis, in comparison with those adopted by the trial court, made for the defendants by Mr. Angers, the following tabular form of value conclusions have been extracted from the testimony and the exhibits:

Charles A. Patout et al.

Parcel	Area	Chappuis (for plaintiff) Value Taken	Severance Damage	Total	Angers (for defendants) (The award of the trial court) Value Taken	Severance Damage	Total
6-1-R-1		$1100	$ 580	$1680	$ 905	$ 243	$ 1148
6-7-R-1		95	-	95	155	-	155
6-27		20	-	20	Not included	-	-
6-28 & 6-28-A		6150	570	6720	5748	683*	6431
6-33		1920	-	1920	1800	-	1800
6-34		885	835	1720	828	669*	1497
6-36		1540	-	1540	1438	518*	1956
Subtotal		$11710	$ 1985	$13695	$10874	$ 2113	$12987
6-30	37,831 sq. ft.	3040	Damage to		9836	1507*	
6-23	75,614 " "	6075			18904	1610*	
6-31	55,357 " "	4448	all		13839	906*	
5-22	10,559 " "	848			2640	1330*	
5-21	48,736 " "	3916	remainer		12184	2531*	$16049
5-23	24,272 " "	1950			6068	820*	
5-24	1,515 " "	122	parcels		379	666*	
Streets	2.295 Acres	8045				Included in lot evaluation	
5-18	5.216 "	18256	$13360[3]		16691	(6679[1]	
						(27601[2]	
Subtotal		$46700	$13360	$60060	$80541	$43650	$124191
Total		$58410	$15345	$73755	$91415	$45763	$137178

1 Owned by defendants
2 Not owned by defendants
3 Damage to remainder of all parcels, 6-30 through 518 inclusive
* The damage to partially taken lots owned by defendants, a total of $11483

An examination of the above table reveals that the difference in the award (based on Angers) of $12,987.00 and the State's estimate (based on Chappuis) of $13,695.00 is so slight and all values are so similar for Parcels 6-1-R-1 through 6-36, that no consideration of error should be made in the indicated areas.

It is the valuation of the land and damages on Parcels 6-30 through 5-13 in which the wide divergence appears and in which error on the part of the trial court may be found. Chappuis' estimate for the latter area is $46,700 for the land taken, and $13,360 for damages to the remainder (owned by the defendants) a total of $60,060. Anger's estimate (which is the trial court's award) is $80,541 for the land taken, $6,679 for damages to remaining land owned by defendants and $27,601 for damages to remaining land not owned by defendants, a total of $124,191 (more than twice that of Mr. Chappuis).

Four errors are made by the trial court here: (1) Allowance of values based on a subdivision which was undeveloped cornfield, no more than potential subdivision in its highest and best use, (2) In basing its award for damages on the same value, (3) Allowance of damage not based upon "before and after values" and (4) Allowance of damages to land not owned by the defendants.

And now again assuming, in the alternative, that this Court has agreed with the trial court's finding that the defendants did not act in bad faith, we are then confronted with the ordinary problem of fixing just compensation in the Vermilion Development Company, Inc., Case, District Court Docket No. 33,209.

The deposit in the Vermilion Case was $115,350 for the five houses built on five lots, the purcahse of which lots and the construction of which houses the State contends were made in bad faith. A reappraisal of the five houses (presumably) was made (my record is not complete) and Mr. Chappuis testified to $124,550.00 for the State. This was accepted by the trial court (pp. 21 and 23 of Reasons) and is certainly the maximum award which can be justified by the record.

The trial court made an additional award of $3,591.00 to defendants predicated upon an alleged delay in defendants' completion of a house not within the taken area (p.

Since the house and lot were in no way involved in the taking in any of these suits, the State objected to any testimony as to this alleged damage (pp. 109,210-211, 215, and 512-513), which objection was sustained by the trial court and was never overruled except inferentially by the award. Thus the Court erred in making the award on the grounds that he had already sustained the objection and, further, that it was error to make the award even if he had overruled the objection, since no matter outside of an expropriation suit may be brought into it.

SPECIFICATION OF ERRORS

1. The trial court erred in holding that the defendants acted in good faith when they purchased property and built houses within the highway right of way as projected by their own engineer at their request, and alternatively, as to all the following:

2. The trial court erred in basing the award for undeveloped property, which was a cornfield adjacent to developed property and was thus no more than potential subdivision and as such worth no more than $3500.00 per acre as appraised by the State's appraiser, Mr. Chappuis. (Defendants' appraiser, Mr. Angers, appraised adjoining property as potential subdivision land, worth $3200.00 per acre, and stumbled badly attempting to justify a value of about $10,000.00 per acre for the land in the cornfield). (p. 567-569)

3. The trial court erred in fixing an award for damages based on developed lots in a cornfield not possibly worth more than $3500.00 per acre as potential subdivision land.

4. The trial court erred in fixing an award for damages on an alleged deferred use instead of a "before and after" valuation.

5. The trial court erred in awarding damages to defendants on land which they did not own, on the theory that their option to buy the land was an "agency coupled with an interest" (p. 530). A peremptory exception of no cause or right of action was filed by the State directed to this claim in paragraph 5 of defendants' answer but

was not expressly overruled by the trial court and is re-urged here.

6. The trial court erred in making an award of damages to a house in no way a part of the expropriation suits, especially when he had sustained an objection to its introduction into the trial.

ARGUMENT

(Correlated with Specification of Errors)

1. On the question of the bad faith of the defendants in their deliberate purchase of 61 lots and the construction of five houses within the highway right of way, I know no way bad faith can be shown more convincingly than is shown by the testimony of the defendants themselves.

The defendants acquired a map from the Department in 1961 which showed the proposed projection of I-10 from the interchange with State Route La 3052 and they had their own engineer project the proposed highway on a map of the subdivision and they then bought the lots which fell within that projection and built five houses upon five of the 61 lots.

The defendants' own testimony makes clear that from 1961 until the expropriation in 1964 they knew exactly or almost exactly where the highway would be constructed and in 1963 they purchased 61 lots so staggered diagonally in their location across the (paper) subdivision as to leave absolutely no doubt that they were acquiring the property with absolute certainty that it would be sold to the State for an enormous profit. (They paid $2000 per acre and the Court awarded them 25¢ to 28¢ per square foot, or approximately $10,000 per acre, excluding "streets"). And they even took the precaution of compelling the vendor to wait for his pay until they had the payment from the State, itself clear evidence they knew full well the land was within the highway right of way.

And not satisfied with the profit they planned to get, and have gotten, on the land, profit paid by the public, they had the unmitigated gall to build five houses on five of the 61 lots. And even with this brazen behavior, did they build the standard quality house for the subdivision. No,

they build houses of nearly twice the value typical of the subdivision quite obviously in a final further effort to exact additional profit from the public's efforts to build highways. And the defendants say this is not bad faith and, infinitely worse, the trial court agreed and let them escape their richly deserved retribution. Now this Court is implored to impose justice upon this scheme of the defendants.

While I have seen many "sales" of land I suspected to be for the purpose of creating large values for land in anticipation of the construction of a highway, and the construction of the Interstate System is especially vulnerable to this because of the requirement of public hearings and total revealing of plans years before they may mature, there is very little jurisprudence on the subject in this State, and not a lot anywhere.

The only case found in Louisiana dealing directly with this sort of problem is State v. Laird, 219 La. 567, 53 So. (2d) 674 (1951).

In the Laird Case the Department of Highways filed suit on June 4, 1947, under the general expropriation statues (LSA-R.S. 19:1 et seq.) for the expropriation of a tract of land for highway purposes. Under this statute the Department acquired no title, right or interest in the land being expropriated until the judgment of expropriation was granted and the award was paid, [1] which was at least a year later, though the exact date is not given in the opinion.

The original defendant sold the property more than a year after the suit was filed but before it was finally tried and before the judgment was rendered and before the deposit of the award was made. In short, when the property was sold the State had acquired no interest in the property of any kind, with the effect that, by comparison with the matter involved here, defendant-vendor and defendant-vendee had been notified that the ownership of the property was being sought for public use.

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1 Defendant" . . . was divested of the ownership of his land only after the judgment of the trial court was rendered, read, and signed, and the deposit was made in the registry of the Court." State of Louisiana, through Sabine River Authority v. Miller, 250 La. 663, 198 So. (2d) 397, 400 (1967).

The vendee of the property, presumably relying on the fact that his property had not yet been expropriated but with knowledge of the pendency of the suit and before judgment was signed and the deposit made, constructed certain changes in the property. He built a garage and began business in it and made other related changes in the property.

On the trial of the case the defendant-vendee (Habert) was awarded, among other things, "$300.00 for removing and reconstructing garage; $42.00 for building another driveway to butane tank and reconstructed garage;" and "$750.00 for consequential damages," all of which were denied by the Supreme Court on the ground that when the garage was built and the business in it was begun, the defendant-vendee had knowledge that the expropriation of the property was in prospect.[2]

I submit that we have, for our purposes here, an exactly parallel situation to that of the Laird Case, supra.

At the time Habert (purchaser of the Laird property) bought and built his garage and began his business on the property to be expropriated, he knew that the property would be or, at least, might be expropriated. On that ground alone, the Supreme Court held that he could not recover for damages to changes he had made in the property after he had that knowledge.

This is exactly the position of the State in this case. The State contends that defendants purchased the property for $2,000 per acre and built five houses upon it, not only with knowledge that it would be expropriated but with absolute certainty that it would be done, and that they did

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2 "Although the record is not clear on whether Habert knew of the pendency of these proceedings at the time he purchased the property, he himself admitted that he knew of them on the day he signed the act of sale, though subsequent to the signing. This knowledge, together with the warning given him by the Highway Department representatives when he began construction of his new garage, certainly bars recovery for removing and reconstructing the same and for rebuilding his driveway. These two items ($300 and $42) will therefore be disallowed.

". . . we hold that appellee's admission that he had built the shop after his purchase, and therefore, after he had received knowledge of the pendency of these proceedings, together with his failure to prove the income of this shop, answers his own contention adversely. The consequential damages, not being proven, cannot be allowed." (Emphasis added) State v. Laird, 219 La. 567, 53 So. (2d) 674, 676, 677 (1951).

not act upon this knowledge until they had technical assistance from their own engineer in locating and making certain exactly where the acquisition would be.

It does not appear to me that the Supreme Court's decision in the Laird Case, supra, turns upon the question of good or bad faith but merely upon the question of knowledge of the prospective expropriaton, which concededly may be a euphemistic description of "bad faith."

The general tenor of the very limited number of decisions in other jurisdictions seems to hinge squarely upon bad faith and the rule is well stated in paragraph 294, Eminent Domain, 27 Am. Jur. (2d) 105-106[3] and in paragraph 175(1), Eminent Domain, 29-A C.J.S. 748.[4]

It seems obvious that in a case of this kind, as in most eminent domain issues, the courts have a very difficult task of balancing the rights of the landowners against those of the public to arrive at constitutionally " just compensation."

Here the Court must balance the traditional right of the landowner to do with his land as he pleases, so long as he avoids harm to others, with the public's right to be protected from the exploitation and sharp practices of those who seek to profit unfairly from the public's efforts to furnish needed public improvements.

The courts appear to have struck a balance along the lines of good or bad faith, which appears to be the question of whether the change in the landowner's position, upon which he bases his demand for compensation, was made with knowledge of the future expropriation and for the purpose of exacting more compensation from the

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3 "Where . . . a building is erected or moved upon land which the owner knows is to be taken by eminent domain, and is placed upon such land in bad faith, with the sole purpose of enhancing the damages and not in the natural, ordinary, and legitimate use of such property, the building remains personal property and should not be considered in determining the value of the real estate." Eminent Domain § 294, 27 Am. Jur. (2d) 105-106.

4 "While one may in good faith purchase or improve land regardless of any probability of a subsequent appropriation for public purposes, no compensation can be recovered for improvements placed on the land for the sole purpose of enhancing the damages to be recovered on a subsequent condemnation." Eminent Domain § 175 (1), 29-A C.J.S. 748.

public than he would have been entitled to receive had he not made the change.

I submit that where these two factors are present the courts cannot permit the guilty landowner to demand the compensation he would be due had he not had the knowledge and acted to obtain the unfair advantage.

Again, I submit that the actions of all defendants clearly show that they, and each of them, knew that the property they were acquiring and improving was squarely within the highway right of way and would, of necessity, be acquired by the State. In my view this is all that our Supreme Court has required to defeat the demand of a landowner in the situation we have here.

But we can and must go on to say that the actions of all the defendants show not only that they acted with full knowledge but that they acted with the intent of increasing their claim against the State.

If the actions of the defendants in this case do not constitute bad faith and defeat their demands, I cannot possibly conceive of actions which would.

The award should be fixed at the value fixed in the amended petitions of plaintiff, $34,830.00 for Charles A. Patout and Lawrence C. Richard, and $18,074.00 for Vermilion Development Company, Inc.

And now in the alternative, assuming that the Court has agreed with the trial court, either that the defendants did not have knowledge of the proposed highway acquisitions, or, having knowledge, did not act in bad faith, we come to the argument on the remaining five errors alleged here by the Department.

2. There is probably very little I can say here to show why the trial court awarded approximately $10,000 per acre for a cornfield other than the fact that the defendants were able to find an appraiser who would testify that the cornfield would be valued by a purchaser (the market value) as lots just because it was included in "subdivision plan" even though no development had taken place.

I see no way the defendants' appraiser could distinguish the value of the cornfield within the mapped area at $10,000 per acre from the cornfield adjacent to it at $3,200 per acre. I ask the Court to look at the appraiser's

painfully clumsy effort to explain this (Testimony 568-569).

It is my considered opinion that the Court's acceptance of the defendants' evaluation of the cornfield is squarely in conflict with the Supreme Court's holding on this very question in Parish of Iberia v. Cook, 233 La. 697, 116 So. (2d) 491, 496 (1959). In the Cook Case the landowner sought to value the expropriated property as lots but this was rejected as an ".....owner's plans or hopes for the future ..... (and) ..... completely irrelevant, ... being more ..... illusory than real."

In this case the landowners had the right to buy and sell the area and had been attempting to sell the portion of the area they already owned as lots since 1958 (6 years at the time of expropriation) and had not considered it desirable to pay $2,000 per acre for it until they learned it was to be expropriated, which they obviously would have been happy to do, had it actually been worth $10,000 per acre, as was estimated by defendants' appraiser, Mr. Angers, which was the award made by the trial court.

I admit that this highly optimistic approach by Mr. Angers is not an unusual appraisal approach, and that although Mr. Chappuis used substantially the same method to test his acreage approach with a substantially different result, the trial court's acceptance of Mr. Angers' appraisal of the part taken is not manifestly erroneous except that it assumes that all can be developed and sold on the day it was expropriated when their own testimony shows that they had sold less than remained and that it had taken them six years to do it. Mr. Angers could and did very happily compute the delay in developing and selling the remainder for five years and call this damage but he fails to use this same sort of discount to reduce the value of expropriated lots to reflect the inescapable delay in developing and marketing the lots. And this is obviously serious and manifest error.

And now we come to the problem of comparing in detail the appraisal made by Mr. Chappuis and that made by Mr. Angers, the latter of which was adopted by the Court.

As is shown in the statement of the case and the tabular arrangement made a part of it, there is no really

significant difference in the defendants' appraisal by Angers, the Court's award, and that made by the State's appraiser, Chappuis, as Parcels 6-1-R-1 through 6-36. And this is substantially true as to Parcel 518 except as to damages, in which the two appraisers treated the remainder as a different area.

But for the purpose of comparison of the area in which the great divergence in value is to be found it is probably best understood as all the area west of the Parcels 6-34, 6-35 and 6-36.

In this area (Parcels 6-30 through 518) the State's appraiser fixed the value of the part taken as $46,700 and the defendants' appraiser and the court fixed the value as $80,541.

This astounding difference lies almost entirely in the fact that Mr. Chappuis fixed the value of the undeveloped portion of the land taken by comparison with the sales of other undeveloped potential subdivision properties, while Mr. Angers' estimate assumes an instanteneous sale of all the property in fully developed subdivision lots. I do not see how this estimate could be given serious consideration and it actually is contradicted by Mr. Angers' methods of computing damages (delay in development and sale of lots) invalid really for either.

But the trial court not only gives it serious consideration, he adopted it in toto.

Obviously, I do not expect this Court ever to reach this point but, if it does, I know no other way to show manifest error so glaringly present than I have done.

3,4 and 5. And now we come to a comparison of the estimates of damage to the remainder, as estimated by Mr. Chappuis and as estimated by Mr. Angers, the latter of which was adopted by the trial court.

To see a graphic representation of the areas treated by Mr. Chappuis in his damage study, please refer to the copy (Exhibit No._____) of his appraisal report in the record and turn to the first map in addenda showing the part taken in orange and the remainder in green. He treated the entire area owned by defendants west of the developed lots, the parcels shown above, not including Parcel 518, as having a before value of $3500.00 per acre and an after value in the north remainder of $2500.00 per

acre on 8.3 acres, "a damage of $8300.00, and $1000.00 per acre on 2.03 acres, the "step like" area left after the taking from the 61 lot purchase, a damage of $5,075.00, a total of $13,375.00 but which he called $13,360.00, arrived at by various "rounding" of individual totals.

Mr. Angers' estimate of damages to the remainder, and I think that nowhere can wilder speculation be found in any appraisal, contains very obvious and very definitely manifest errors, all of which were adopted by the trial court.

Mr. Angers' first error, and that of the Court, in his estimate of $43,650.00, is caused by the same error made in the valuation of the part taken: valuing a cornfield as developed subdivision lots in demand as such.

Mr. Angers' next error, and that of the trial court, is found in the fact that he assigns "damage" to the defendants on property they do not own but only have the right to buy for $2000.00 per acre at such time as the orderly development of the proposed subdivision may make necessary (p.530). Of course, it is comforting to have Mr. Angers' legal opinion that the development contract is an "agency coupled with an interest." It is interesting to speculate as to where he picked up this phrase. But it is many times more interesting to speculate as to how he reached the conclusion that the defendants had suffered the great damages he assessed on the basis of his legal conclusion, which, of course, was adopted by the trial court and which is clearly manifest error.

Mr. Angers is then able to decide that the undeveloped land which the defendants did not own was worth $7,601.00 peracre (no comparables to show this) before the highway construction for five years and that this would result in a reduction in value by 25% (pp. 532-534).

Defendants' appraiser made the same erroneous estimate of damage which has recently been rejected by our Supreme Court in State v. Mason (not yet reported) decided November 10,1969.[5] He failed to base damages on the "before and after" rule.

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5 "The rule is stated by this Court in State v. Central Realty Investment Company, 238 La. 965, 117 So. (2d) 261, as follows:

Throughout this mumbo-jumbo about a five year delay, he neglects to notice that the same rate of development of the subdivision from 1953 to 1964, which took defendants west only to May street, would have gotten them to this remainder many years later than his estimated five year delay. In other words there would be no delay which could be attributed to the highway construction.

By the utilization of the theory of a five year delay, as caused by the highway construction, Mr. Angers decided that the 25% damages amounted to $27,601.00 to the north remainder, not owned by defendants, and $6,679.00 to that owned by the defendants, to that portion of the platted subdivision, and this damage was awarded to the defendants by the trial court. (At this point it should be pointed out again that the defendants did not own the property and conceivably never would. They only had the right to acquire it and certainly could avoid that if they really felt that the property had been damaged or otherwise decided it was unprofitable). Of course, the State's appraiser did not estimate damage to property not owned by the defendants.

"It is well settled in our jurisprudence that damages allowable under Section 2 of Article 1 of the Constitution of 1921, resulting from expropriation of property rights is the difference between the market value of the property for sale or rental purposes immediately before and immediately after the expropriation. Harrison v. Louisiana Highway Commission, 101 La. 839, 188 So. 354; American Tel. & Tel. Co. of Louisiana v. Maguire, 219 La. 740, 54 So. (2d) 4 and Texas Pipe Line Company v. Barba, 229 La. 191, 85 So. (2d) 260.'

"See also State v. Hub Realty Company, 239 La. 154, 118 So. (2d) 354 (1960). Nichols on Eminent Domain, 3rd Ed., in Vol. 4, states the rule thusly:

" 'Section 14.232. Before and after rule.

" ' * * * the measure of compensation when part of a tract is taken is the difference between the fair market value of the whole tract before the taking and the fair market value of what remains after the taking.'

"Louisiana cases cited in support of the foregoing text are American Tel. & Tel. Co. of Louisiana v. Maguire, 219 La. 740, 54 So.(2d) 4; Parish of Lafayette, etc. v. Hernandez, 232 La. 1, 93 So.(2d) 672; Efurd v. City of Shreveport, 235 La. 555, 105 So. (2d) 219; and State v. Central Realty Investment Company, 238 La. 965, 117 So. (2d) 261." State v. Mason, Sup. Ct. November 10, 1969 (not yet reported).

Mr. Angers then estimated $11,483.00 damages to the lots owned by the defendants, both those they acquired in the normal course of their business (maybe) and the 61 lots they acquired along the proposed highway right of way, a portion of which lots were expropriated.

On the area in the platted subdivision not owned by the defendants, Mr. Chappuis fixed no damage and he estimated damage of $1,985.00 on the lots owned by defendants and parts of which were left after the taking of Parcels 6-1-R-1 through 6-36.

The accumulated errors made by Mr. Angers for the defendants, account for the errors of the Court and explain why the State's estimate in this area was $13,360.00 and that of Mr. Angers and the Court, $43,650.00.

And it is in these two areas of evaluation, both as to the part taken and the damages to the remainder, that this Court must resolve the trial court's errors.

6. The Court correctly ruled on the State's objection and rejected testimony of damage to a property in no way involved in the expropriation suits but, having admitted it was a proffer he then made the award as though he had not ruled against it. It would seem to go without saying that an award could not be made for damage to property not involved in the expropriation and this Court has recently spoken of this sort of thing in State v. Mouledous, 199 So.(2d) 185, 192-193 (1967).

Thus, it is submitted that the Court could not make the award of the alleged damage of $3591 to the house not involved in the expropriation suit.

In summary, it is submitted that this case presents the standard evaluation conflict in expropriation cases in which both sides contend they are basing their conclusions on sales, but upon widely differing sales: raw land suitable for subdivision on one hand and developed subdivision lots on the other. On this problem I realize that the resolution is largely a matter of expert opinion and one which is often settled by the appellate court as a manifest error problem. And on this there is certainly room for honest differences of opinion.

But there are three very serious legal problems involved in these two cases and they pose the most serious problems for this Court: (1) The effect on the fixing of

just compensation by the fact that the landowner bought land and built houses within what he knew to be the highway right of way, but did this before it was expropriated; (2) The awarding of damages to defendants allegedly suffered by land which they did not own but did have a right to acquire under a development contract; and (3) The award of damages allegedly suffered by property owned by defendants but not involved in the suits.

I submit that the trial court grievously erred in each of the legal questions and if this Court agrees, the fact error of method of evaluation made by the trial court is not involved.

I further submit that if this Court agrees with the trial court on the legal questions, this Court has facts enough in the record and pointed out above to see the Court's error in excess valuation as to the case involving Charles A. Patout et al., and to approve the award in the case of Vermilion Development Company, Inc., except the inclusion of damages to property not involved in the suit.

WHEREFORE, plaintiff-appellant prays that the Court fix the award of just compensation to the defendants at $34,830.00 in State v. Charles A. Patout et al., Docket No. 3014 in this Court, and $18,074.00 in State v. Vermilion Development Co., Inc., Docket No. 3015 in this Court, with all costs to be paid by the defendants, and in the alternative, that the Court fix the award at $73,755.00 in State v. Charles A. Patout et al., Docket No. 3014 in this Court, and $124,550.00 in State v. Vermilion Development Company, Inc., Docket No. 3015 in this Court.

BY ATTORNEYS,

D. ROSS BANISTER
JOHNIE E. BRANCH, JR.
CHESTER E. MARTIN

BY _____
Of Counsel

CERTIFICATE

A copy of the foregoing was mailed this date to Mr. Frank Smith, Post Office Box 2609, Lafayette, Louisiana 70501, attorney for the defendants.

CHESTER E. MARTIN

ALBERT A. RICHTER

AND

CHARLES A. PATOUT, ET AL

CONTRACT
DATED: SEPTEMBER 16,1958
RECORDED: SEPTEMBER 16,1958
RECORDATION: CONVEYANCE BOOK Y-27, AT PAGE 509, UNDER ENTRY NO. 369838, OF THE RECORDS OF LAFAYETTE PARISH, LOUISIANA

STATE OF LOUISIANA

PARISH OF LAFAYETTE

BE IT KNOWN, that on this 16 day of September, A. D., 1958 before me the undersigned authority, a Notary Public in and for the aforesaid Parish and State and as such duly commissioned, personally came and appeared ALBERT A. RICHTER, married to Leola Richard, residents of the Parish of Lafayette, Louisiana, hereinafter referred to as OWNER, and CHARLES A. PATOUT, married to Rey Meng, and LAWRENCE C. RICHARD, married to Hazel Yeldell, all residents of the Parish of Lafayette, Louisiana, referred to hereinafter as AGENTS, who declared that they have entered and do by these presents enter into the following contract agreement, to-wit:

That ALBERT A. RICHTER, is the owner of that certain property designated as TRACT 1 containing 64.17 arpents or 54.42 acres, located in Section 13 Township 9 South, Range to East of the 3rd Ward of the Parish of Lafayette, Louisiana, and having such metes and bounds as will be more fully shown on plat of survey of Fred L. Colomb, dated August 14, 1958, which plat is attached and made a part hereof, including 45' by 405', more or less entrance to TRACT 1 from North Pierce Street.

That the aforesaid owner desires to subdivide said land for the purpose of selling lots.

The aforesaid OWNER in pursuance thereof agrees to dedicate and bond and obligate themselves to dedicate any or all roads necessary for proper development of said subdivision. It is understood and agreed by and between parties hereto that AGENT shall have authority to cause said land to be surveyed and divided into streets and lots in such manner and in such sizes as he deems expedient.

The said owners further bind and obligate them-

selves to do the following:

1.) To furnish the above land as may be required, free from all encumbrances and with full guarantee of title.

In consideration of the above, CHARLES A. PATOUT and LAWRENCE C. RICHARD, AGENTS, bind and obligate themselves to construct, grade and build all roads requested by themselves to be dedicated by the OWNER appearing herein. It is agreed and understood that AGENTS may at any time assign their interest and obligations, in whole or in part, under this contract without altering said contract in any way. Said Act of Assignment to be recorded in the Parish records.

In consideration of the above Charles A. Patout and Lawrence C. Richard, agents aforesaid, agree to and bind and obligate themselves to furnish, at their own expense, the necessary surveying, engineering and the neccessary large scale maps of the subdivision.

The said AGENTS further bind and obligate themselves to do and perform the following at their sole and own expense, vie.:

1.) To furnish all electricity, gas service for the entire subdivision at their own cost and expense, as street development progresses.

2.) To construct all roads and streets as may be necessary within the subdivision.

3.) To keep the development of streets sufficiently ahead of development at least to the extend of 20 building lots:

The OWNER herein agrees to include in the formal dedication of said subdivision the following covenant; That no dwelling shall be built upon a lot of ground smaller than forty (40) front feet.

The OWNER is to receive $2,000.00 per acre including streets, as renumeration for the property, said renumeration to be made on the basis of the ratio each lot bears to one acre of land.

It is agreed that said contract and agreement herein set forth, it is not to terminate upon the death of either party, but to pass to the legal heirs of each or either party hereto, the said heirs to be bound to performance according to the respective duties and obligations of the parties

hereto.

That the principal consideration for the provisions of the last paragraph above is the financial obligation of subdividing the said land, constructing roads, and arranging for gas and light service to the said property, and that in the event of the death of the said agents or either one of the said agents, their heirs shall inherit their said interest in the said land, and incur their obligations of performance of the contract.

The OWNERS herein agree to sign all deeds to the property as sold by the AGENTS herein. It is further agreed that the AGENTS may sell any number of lots per year, and that such sales are not to be limited by the OWNERS.

It is agreed by and between the parties hereto that all sales are to be made for a cash consideration; if the AGENTS wish to sell on credit, they may do so provided they accept the note and pay the other parties their portion in cash; unless parties agree mutually to accept notes for their share;

It is further agreed that all sales money is to be divided between appearers as soon as each sale is complete; or if a sale has been made and accepted on credit, by one party, the other is to receive his share at the time of the passage of the sale, unless parties mutually agreed otherwise.

It is especially agreed that this agreement is to be one of agency and not one of partnership; that the parties hereto have no desire to form a partnership, but that this is a contract of agency, that, therefore, the OWNER herein is to be in no way responsible for any debts or obligations created by the AGENTS herein, in pursuance of the above, nor are the agents to be responsible for or liable for any debts or obligations created by the OWNER in the pursuance of the above.

It is specifically agreed and understood by and between the OWNERS and AGENTS herein, that this contract agency is one coupled with an interest, and that the same is irrevocable during the term thereof.

The parties hereto further declare that, all construction, grading, dirt moving, etc., is to be performed by the said AGENTS, and under their sole direction and

control, and, for that reason, the said OWNERS are not to be responsible for injuries to person or property caused by any such work.

This contract shall terminate automatically and without the necessity of further action when the last lot is sold, and, consequently will remain effective and in full force until all of said lots are sold.

THUS DONE AND PASSED IN THE PARISH OF LAFAYETTE, LOUISIANA, on the first day above written in the presence of the undersigned competent witnesses, who have signed with me and appearers after due reading of the whole.

/s/ ELRITA H. MEAUX
/s/ R. J. RAYER, JR.
/s/ EUGENE PATOUT
/s/ ALBERT A. RICHTER
/s/ CHARLES A. PATOUT
/s/ LAWRENCE C. RICHARD

/s/ SARA P. BURLEY
NOTARY PUBLIC

CLERK OF COURT
LAFAYETTE, LA.
FILED THIS DAY
SEP 16 4:59PM '58
RECORDED PAGE
/s/ JOHN I. COMEAUX
DY. CLERK OF COURT

CLERK OF COURT
LAFAYETTE, LA.
(SEAL) FILED THIS DAY
SEP 24 1:05PM '58
RECORDED Y-27 PAGE 509
/s/ EVELYN PREJEAN
DY. CLERK OF COURT

NO. 3014

March 12,1970

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF HIGHWAYS

Plaintiff-Appellant,

VERSUS

CHARLES A. PATOUT and LAWRENCE C. RICHARD

Defendants-Appellees

Appeal from the Fifteenth Judicial District Court for the Parish of Lafayette, Honorable Charles T. Everett, District Judge, Presiding.

Before TATE, CULPEPPER AND MILLER, Judges.

MILLER, Judge.

As authorized by Section 19.1 of Article VI of the Louisiana Constitution and by LSA-R.S 48:441-460, the Louisiana Department of Highways expropriated certain property in the Parish of Lafayette for the construction of Interstate Highway I-10. Landowners, insofar as we are here concerned, were Charles A. Patout, Lawrence C. Richard and Vermilion Development Company, Inc. The two expropriation suits were consolidated for trial and appeal purposes, and we are handing down separate decrees. See_____So.2d_____(#3015) for the decree in the Vermilion Development Company, Inc. case.

In accordance with the November 18, 1964 order of expropriation, the Highway Department deposited $58,800 for the properties owned by Patout and Richard, and $115,350 for the properties owned by Vermilion Development Company, Inc. Defendants withdrew the deposits in December, 1964, and answered demanding $522,458.43 and $115,900.00, respectively. In April, 1965, the Highway Department amended its pleadings to reduce its tenders of damage to defendants to the sum of $34,830 and $18,074, respectively.

After ten days of trial during June and July of 1965 and after taking the cases under advisement, the trial court handed down written reasons awarding $137,178 to Patout and Richard and $128,141 to Vermilion Development Company, Inc. The Highway Department appealed and defendants have answered both appeals seeking an increase in the award to Patout and Richard to $218,738 (subject to credit for $58,800 previously deposited) and to Vermilion Development Company, Inc. to $145,275 (subject to credit for $115,350 previously deposited).

The issues are: (1) Did landowners purchase the expropriated lots and construct five houses (on six of these lots) in bad faith with the sole purpose of enhancing an award of damages to them? (2) What is the effect of the development contract executed and recorded in 1958? (3) What is the value of the property expropriated? and (4) What is the value of the severance damages?

The following statement of facts by the trial judge has been accepted by the parties. The parenthetical additions are substitutions or additions by the writers.

"It is stipulated by and between counsel that a public notice of a public hearing to be held in Lafayette, Louisiana was published in The Advertiser, a Lafayette newspaper, on September 10, 1959; further that the public hearing regarding the contemplated construction of I-10 through the Lafayette area was held in Lafayette, Louisiana on October 6, 1959.

"It was further stipulated that the salvage value of the 5 houses expropriated from Vermilion Development Company, Inc. was $17,760.00

"The property owned by defendants and involved in this case is located partly in the Richter Park Sub-

division of Lafayette Parish, Louisiana, and partly in property located adjacent thereto and included in a proposed future extension of such subdivision. The property involved in (the Vermilion Development case) is improved and the property involved in (the Patout and Richard case) is unimproved. Plats of survey showing the properties involved in the taking are attached to both suits as Exhibit P-3.

"Originally, A.A. Richter and Robert H. Richter owned a rectangular shaped tract of land containing 108.82 acres. They had a partition of this property with A. A. Richter taking the north one-half thereof and Robert H. Richter taking the south one-half. Shortly thereafter, and on the same day, September 16, 1958, both Richters entered into separate but similar development contracts with Charles Patout and Lawrence Richard under the terms of which they obligated themselves to sell their land to such developers at the rate of $2,000.00 per acre in exchange for the development of such land into a residential subdivision.

"Contemporaneously with the above transaction, Richard, Charles Patout and his brother, Eugene Patout, created the Vermilion Development Company, Inc., which corporation was owned by the three men in the proportions of one-third to each. The corporation was to purchase property from the developers as lots and build homes on them which it was to sell to the general public.

"The original plan was to develop the property covered by the development contracts in a prudent, orderly, and efficient manner. The first subdivision created on December 3, 1958 was called Richter Park Subdivision and consisted of a street running north and south called Richter Drive with building plots on either side having dimensions of approximately 60 feet fronting on said street by a depth of approximately 105 feet. Approximately in the center of Richter Drive was Julie Drive, which began on the west line of Richter Drive and extended westward. Richter Drive above and below Julie Drive was called North and South Richter, respectively. The plan operated as expected and in due time the lots in the subdivision were sold to the corporation (which) constructed homes on such lots and sold them to the general public.

"In time, the need for additional lots arose and on September 11, 1959, Richter Park Subdivision, Extension No. I was created. Julie Drive was extended further westward, and North and South Orleans was created with lots on either side thereof similar in size and plan to that employed in the original Richter Park Subdivision. There was also created at this time, Covington Drive and Hammond Road at the north and south ends thereof respectively.

"The same need for additional lots prompted the creation of Richter Park Subdivision, Extension No. 2 on February 22, 1962, with Julie Drive, Covington Drive and Hammond Road being extended still further westward and the creation of North and South May Drive as the main street of this extension. Lots size and shape were similar to the two preceding subdivisions.

"Subsequent thereto Albert A. Richter and Robert Richter sold to Charles A. Patout and Lawrence C. Richard all of the property owned by them located south of the proposed extension of West Julie Drive up to the railroad right-of-way so that at the time of the taking, (Patout and Richard) owned all of the property located south of West Julie Drive.

"During this period of time, Louisiana Highway No. 3052 (US 167) was created, being located just to the east of the Richter Park Subdivision complex. The interchange or intersection of this highway with the proposed Interstate Highway 10 was so located that the westerly leg thereof, having a right-of-way 300 feet in width, extended into the Richter Park Subdivision to a point located midway between North May and North Orleans Drive or on a line running north and south and located on the rear or back lot lines of lots facing North Orleans Drive and North May Drive.

"Properties owned by defendants herein and affected by such intersection were acquired from them by plantiff by voluntary sales, (recorded Aug. 1, Sept. 6 and Sept. 27, 1961) copies of which are on file in these proceedings.

"On January 29, 1963, Charles A. Patout and Lawence C. Richard purchased from A. A. Richter, 61 lots,

6 of which were located in the Richter Park Subdivision, Extension No. 2, and 55 of which were located in the undedicated and unimproved portion of the Richter tract scheduled for eventual development as a residential subdivision. All of these lots, without any exception whatsoever, were located completely within or were partially affected by the right-of-way of Interstate 10.

"Counsel for the Department argues that the defendants acquired knowledge of the location of the right of way prior to the taking, and in anticipation of that taking acquired from the owner just that property located within right-of-way and, therefore, were unjustly enriched at the public expense. Bad faith is contended in its effort to deny to defendants the compensation they seek, or the amount first deposited when this suit was filed.

"It is argued that, (since) the interchange or intersection of U.S. I-10 with La. State Highway 3052 (US 167) was located just east of the Richter Park Subdivision..... the defendants realized that price then being paid to landowners was good and they set about making plans to get as much money as they could when the State came to buy property for the Interstate continuation westward over and across this property. It is said in brief that defendants' maneuver was to gain the sympathy of this Court. Counsel argues further that a strip map of I-10 was supplied by the Department and was interlaid over a plat of the subdivision enabling defendants to determine exactly where the highway would run. This was (furnished in 1961). Further, the Department asserts that the center line of the highway was established in March of 1959 by the placing of stakes which could be clearly seen by all viewers.

"The defendants asked the Department if it needed any further right-of-way as of August 5, 1961, but Counsel contends that this was 'to complete the position of innocense of themselves' and that the reply by the Department which read in part as follows: 'We do not contemplate the acquisition of any further right of way in your subdivision, for the proposed Lafayette Intersection,' made it clear that the (letter referred to) the intersection only.

"Counsel then attacks the purchase by Patout and Richter of the 61 lots in (January of) 1963 as being an integral part of the scheme to unjustly enrich themselves

at the public expense. They then knew, the Department says, that the highway was to occupy this identical area. The construction of the residential houses on 5 of these lots of a value above those in the general area is another indication of bad faith, suggests the Department. The construction of these houses commenced in March, (or April) 1964.

"The testimony of Albert A. Richter is referred to in support of the State's position and he is quoted to say that Mr. Patout told him he wanted to buy the lots to make money on the Highway Department. This Mr. Richter, it is noted, is the same Albert Richter who settled his case with the Department and then attempted to intervene in these suits, making substantially the same contentions as the Department.

"Defendants argue that they were guilty of none of the accusations made by the Department of Highways. They insist that they were acting in the normal and customary course of development in subdividing property for resale. They were, in fact, experienced men in the real estate business and had developed other subdivisions before. It is vehemently denied by Mr. Patout and all others concerned that they knew where the highway was to pass and schemed to unjustly enrich themselves by virtue of this knowledge.

"Counsel for defendants argues that the Department knew just where the highway was to be but took no affirmative steps to prevent the defendants from developing the land adversely to their interest. Mr. Louis Smith, employee of the Department of Highways, stated that he ran the center line of I-10 through the subdivision area and placed stakes every 100 feet some time in March of 1959 but permanent markers were only placed in the center of the railroad track to the west. He further stated that unless a person had access to field survey notes it would be difficult to locate these permanent markers. Neither the defendants nor their engineers had access to this information.

"Mr. Frank Chachere, surveyor for the Highway Department, said that he saw about 2 blocks of the subdivision developed in 1959. He states that he sent this information to the Department.

"Mr. Henry McBride, a right-of-way agent for the Department, stated that if construction is going on on the right-of-way it is usual to ask owner to stop.

"Mr. Robert Bethea, Assistant Right-of-Way Agent for the Department, states that the vicinity maps available in 1959 did not show the exact location of the proposed rights-of-way. He went on to explain that where construction is going on in an area contemplated to be taken that they attempt to notify the owners not to incur additional expense. There can be some purchasing before the project is approved but only in cases of protective buying where construction is known to exist or to be commenced or in hardship cases to protect the individual.

"Mr. L. J. Lejeune, Review Appraiser for the Department, acknowledged that he had received a letter from Mr. Eugene Patout, President of Vermilion Development Company, requesting knowledge of the location of the right of way, and he had replied to the same. These letters are significant and are copied here in full.

"'August 5th, 1961

Mr. Lejeune
Louisiana Department of Hy.
Land Appraisal Department
Baton Rouge, Louisiana

RE: Richter Park Subdivision and
Richter Park Ex. #2
Lafayette, Louisiana

Dear Sir:

Due to contractual commitments on the above captioned subdivision(s), and work now being done not only by our corporation, but by the developers, Patout-Richard Agency, the time has come where it is imperative that we begin negotiations on any other right of ways that the state and/or state-federal projects might intersect the above captioned property.

We will suffer grave damages in our development of the property unless we can effect sale to you on any other property which you might need for your projects.

Relocation of water lines, sewer lines, etc, on our part and the possible relocation of street (now being paved) as well as existing drainage and engineering could cause us irreparable harm.

We have been advised by our attorneys to notify you immediately of the situation as it exists today, and to request that you submit for an amicable settlement for future ROWs as a necessary expedient so that damages to us will be minimized.

Please acknowledge this letter by early mail, as it is impossible for us to stop our operations upon the ASSUMPTION that Interstate No. 10 MIGHT intersect our development.

Yours very truly,

VERMILION DEVELOPMENT CO. INC.

BY: /s/ EUGENE W. PATOUT
Eugene W. Patout, President

EWP/c' ''

" 'August 17, 1961

F.A.P. I-10-2(12)101
STATE PROJECT 450-05-03
LAFAYETTE INTERSECTION
LA. 3052 INTERSTATE HWY.
LAFAYETTE PARISH

Mr. Eugene W. Patout
President
Vermilion Development Co., Inc.
122 N. Richter Drive
Lafayette, Louisiana

RE: RICHTER PARK SUBDIVISION &
RICHTER PARK EX. # 2
LAFAYETTE, LOUISIANA

Dear Mr. Patout:

In reply to your letter - of August 5, 1961 - and also our telephone converation this date, please be advised that I have discussed this matter with our Engineering Department and we do not contemplate the acquisition of any further right of way in your subdivision, for the proposed Lafayette Intersection. As far as can be determined, our Construction Plans are complete and we have-as of this date-acquired all right of way necessary for the construction of this project.

If we can be of any further assistance to you, please feel free to call upon us.

Yours very truly,

/s/ L. J. LEJEUNE
L. J. LEJEUNE
REVIEW APPRAISER

LJL/mep' "

"Having heard nothing from the Department subsequent to this communication, 5 homes on the 2 tracts involved in (the Vermilion Development case) were begun in March and April of 1964. Mr. Patout stated that they were constructed because he felt the market was such that this type home could be sold. In July of 1964 he was told by Mr. Maurice Chappuis, one of the appraisers for the Department, that the highway was to come through Richter Park. At this time the fifth home on these five lots was possibly 95% (or 99%) completed. Mr. Chappuis advised him that someone from the Highway Department would contact him and Mr. McBride later on did contact him. He thereupon discontinued all construction in the subdivision, and within the limits which he then understood the highway would encompass. After he received

the July 24, 1964 letter from Mr. Cope, he states that he discontinued operations but immediately started new construction in a different area of the subdivision. These houses were in the price range of $20,000.00 and upward.

"The July 24 letter referred to above reads as follows:

"'July 24, 1964

STATE PROJECT NO. 450-04-03
F.A.P. NO. I-10-2 (12) 101
LAFAYETTE - INTERSECTION - La 3052 Highway
ROUTE I-10
LAFAYETTE PARISH

Vermilion Development Company, Inc.
100 North Richter Drive
Lafayette, Louisiana

ATTENTION: Mr. Eugene W. Patout,
President

Dear Mr. Patout:

As you have previously been advised by Mr. Henry H. McBride of our Lafayette District Office, the Department is contemplating the acquisition of property for the above caption project in the near future. This project will involve the construction of a portion of Route I-10 through Richter Park Subdivision within the confines of your ownership.

We are not concluding our survey of the area required from your ownership. Survey crews on the ground are taking topograph and this, when plotted, will complete the property map of Richter Park. We also have professional Real Estate Appraisers in the area developing the necessary data to finalize in appraisal of the area required from you.

It is anticipated that all data will be processed in sufficient time to permit us to begin formal negotiations about

August 1, 1964. This, of course, is a tentative date assuming development of no unusutl difficulties.

Inasmuch as the development of a complete survey map and appraisals of a highly developed area such as Richter Park is a very complex operation, we request that you delay construction of additional improvements within the required area until negotiations for the required area can be concluded. We will, of course, expedite our acquisition process as much as possible in this instance.

Your cooperation in this matter will be greatly appreciated. Should you desire any additional information in connection with this project, please do not hesitate to call on us.

Yours very truly,

/s/ GENE N. COPE
GENE N. COPE
SENIOR RIGHT OF WAY AGENT

GNC:sbz' "

To these facts we would add that the landowners had a plat prepared in 1961 by their engineer, Mr. Roland Laurent, for the purpose of showing which lots might be taken for Interstate 10. This plat showed that the 61 lots (later) purchased by Patout and Richard would be affected, and that some 230 lots would not be within the right of way. This 1961 projection almost exactly traced the right of way expropriated in 1964. When it is noted that in 1961 these same landowners sold property for and had plats showing that the I-10 - US 167 interchange would have to feed I-10 traffic across the Richter subdivision, it is easily understood how the landowners' engineer accurately projected the right of way boundaries.

The record is replete with testimony, even from the landowners, that they knew or were almost certain that I-10 was going to cross Richter Park so that it would join the west leg of the I-10 and US 167 intersection. We note again that the western terminal of this intersection was in

Richter Park and add that in the 1961 amicable sale of right of way, the Department purchased some slabs which had been laid for construction of houses,

In January of 1963, when Patout and Richard purchased the 61 lots that blanketed the right of way (which is the subject of this taking), their subdivision development had approximately 100 homes built and sold (occupying 100 lots.). They had on hand approximately 130 lots (most of which were undeveloped). Furthermore, they could have selected another 100 lots that the Richters were obligated to sell to them. Some of these 100 lots were covered with beautiful trees.

On cross-examination, Mr. Patout was press to explain just why he selected the lots which blanketed the right of way and no others. After stating that his engineer did a good job projecting the right of way lines, he was asked (Tr. 328,9):

> "Q. Was the fact that they were located within this projection by chance, by design or by coincidence?
>
> "A. The only way I can answer that, sir, is to tell you that in the developing business one must be very careful how he outlines and develops his property. An intelligent developer who makes money doing it has a tough time. He must consider all possibilities. But, he doesn't have to be a mind reader for this statement.
>
> "Q. So you're telling us that this purchase of the lots located in what you thought might be a right of way was the intelligent decision you made at that time?
>
> "A. I - I - I agree it was an intelligent - the intelligent decision to make at that time, since I wanted to buy all of the property. And Mr. Richter wouldn't sell it to me."

The offer to buy all the property was conditioned on Richter selling it on credit.

Mr. Richter testified that the January 1963 sale of 61 lots was a credit sale with his $2,000 per acre pay-

ment due after the Highway Department would pay Patout and Richard. But later in 1963, the purchasers came to him and paid cash for the acreage included in the 61 lots and took back their written agreement to pay after the Highway Department paid them. He also testified that at the time of the sale, the purchasers stated that they wanted to make a lot of money from the Highway Department. At that time, he showed them the centerline stakes placed by the Highway Department survey crews.

The trial court apparently discredited Mr. Richter because he later attempted to intervene in the litigation on the side of the Department. But we note in one of the landowners' exhibits (D-60) that their attorneys referred to a January 29, 1963 agreement by Patout and Richard whereby they "agreed to move (Richter's) home from the property they purchased to a location to be designated by you, when and if the Highway Department began expropriating the property for highway purposes." Richter's home was on lots 299 and 298, both of which were in Laurent's 1961 projection of where I-10 would be located and both of which were in the 61 lots purchased by Patout and Richard in January 1963.

Turning now to the five houses built by Vermilion Development. Construction was commenced in March or April of 1964. Carpenters did some of the work at night and the bricklayers worked in the rain under the cover of visquéen provided for their protection from the weather. Tr. 283. These houses were built within 200 feet of the property sold by landowners for the I-10 - US 167 interchange. Four of five houses were built unusually close to one another and the houses are entirely within what obviously had to be taken for the right of way. They were arranged in such a way that they formed a total barricade to the western entrance and exit of the interchange.

Houses built in the subdivision before this time were for the $10,000 to $15,000 market. But these houses were built to sell for approximately $30,000. The developer did not produce a single receipt to show cost of the five houses.

The President of Vermilion Development testified that he knew more about the corporation's affairs

than anyone else. He explained that this location was chosen without any thought that I-10 might need this property. Instead he was motivated to place these more expensive homes in a separate area. He explained:

> "* * * We felt there was a demand for larger homes on the north side of Lafayette. Any, any intelligent developer is not going to go into an area where he might have, let's say, reasonably priced, twelve, fourteen, fifteen thousand ($15,000) dollar homes and build a twenty-five or thirty thousand ($30,000) dollar home next to it. What he's going to do is pick a separate area and develop that into an area of its own. This particular area you're referring to - If we visit Richter Park, you see it's covered with gorgeous trees - pine trees, oak trees. And, it's the most attractive section of it. Now, when I was stopped from building, I was forced to go back into the area where I had smaller homes and construct larger homes. And, I did construct larger homes in there. And, I did sell them. But, normally, that's not the general procedure that's followed." Tr. 292.

A review of the photographs in evidence shows that these homes were not built in the area where trees are to be found. The trees are further removed from the intersection, and most are located outside Laurent's 1961 projection of the right of way.

All experts who ventured an opinion on the subject opined that it was not good business judgment to build all five houses so close together.

The trial court did "not believe the defendants in these cases have acted in bad faith." This conclusion was based in part on Vermilion Development's letter of August 5, 1961, together with the Highway Department's answer of August 17, 1961. Vermilion Development's president showed these letters to some of his prospective customers to show that I-10 would not take any other land from Richter Park Subdivision. On the other hand, an employee of Vermilion Development testified that they also used Laurent's 1961 projection to show that I-10 would go through Richter Park Subdivision. The President did not deny that he had Laurent's 1961 projection displayed on the wall of his office.

We do not agree that the quoted letters establish that the Department of Highways placed itself on record that if would not take additional right of way from Richter Park for I-10. The Department's letter specifically states that they would not take any other right of way for the "proposed Lafayette Intersection," Landowners knew that they had sold right of way for that intersection only one month before.

We can appreciate their need to get the information requested from the Highway Department in their letter of August 5, 1961. Obviously it would be desirable, both for landowners and the public, to have the Department buy all rights of way at the same time. The plain fact of the matter is that funds were not available for this purpose.

The Highway Department has established that the defendants knew with a high degree of certainty exactly where I-10 would be located at the time they exercised their right to purchase the land involved and when Vermilion Development constructed five houses on six of these lots. We are compelled to agree with the statement in the Highway Department's brief, that the construction of the five houses was "quite obviously a final further effort to exact additional profit from the public's efforts to build highways." We find that defendants' purchase of the lots in question and the construction of the five houses was in bad faith and with the sole purpose of enhancing an award of damages to them. The trial court's determination to the contrary is manifestly erroneous.

A landowner who buys land or makes improvements within an area he knows will be required for a public improvement is entitled to be compensated for the land at an amount no greater than he paid and to be compensated for the improvement at an amount no greater than the salvage value of the improvements.
State v. Laird, 219 La. 567, 53 So.2d 674, 676 (1951); Eminent Domain, §175(1), 29-A, C.J.S. 748; Eminent Domain, § 294, 27 Am. Jur. 2d 105,6.

Landowners argue that the Laird case is not in point in that the expropriation proceedings had been filed on June 4, 1947, and the landowner purchased the property on August 5, 1948; and that there the landowner was specifically warned by the Highway Department before he made

the improvements. Additionally, landowners contend that in Laird, the landowner was awarded the market value of his land. But we find no discussion of market value in the opinion. The Supreme Court reduced the award for the value of the land from $813 to $243.90 as suggested by the Department.

When the Laird case was filed, the Department acquired no title, right or interest in the land being expropriated until the judgment of expropriation was granted and the award paid. The original landowner sold the property after suit was filed but before judgment of expropriation was rendered. The court stated that the record was not clear but apparently found that the purchasing landowner did not know of the pending expropriation when he agreed to purchase the land. But he learned about it shortly thereafter and he received notice from the Highway Department not to make improvements. Notwithstanding this this notice he constructed a garage and made other related changes in the property. The Supreme Court reversed the trial court's allowance of $342 "for removing and reconstructing the (new garage) and for rebuilding his driveway." This holding was made in answer to the Department's assignment of error "(2) That since defendant (landowner) had been notified that the suit was pending before he constructed the garage, he is not entitled to recover its value; * * * " 53 So.2d 674,675.

We find the Laird case exactly in point. When Laird made the improvements he knew that the property was likely to be expropriated, and it was held that he could not recover for improvements made thereafter. We find that here, defendant landowners had knowledge of the Highway Department's need for the property which they purchased in January of 1963 and on which they commenced construction of five $30,000 houses in March and April and completed construction in June and July, 1964.

Because of its bad faith Vermilion Development is only entitled to the $17,760 (stipulated) salvage value of the five houses together with the cost of the six lots on which the five houses were located. This purchase price is difficult to determine because payment was made with shares of stock in Vermilion Development. We find that

Vermilion Development's cost was $11,520 for the six developed lots. The trial court's award to Vermilion Development is reduced to $29,280.00. All costs both at tri and on appeal are taxed to Vermilion Development Company, Inc.

The Highway Department contends that this ruling disposes of the claim of Patout and Richard, arguing that they are entitled to recover only their $2,000 per acre cost of the land expropriated. We would agree except for the fact that before these developers purchased the land involved, they owned a right to acquire it at that price. This right was obtained by contracts (D-38, D-39) executed and recorded before there was any suggestion that the la[illegible] might be needed for highway improvements.

On this same issue the trial court awarded severance damages to Patout and Richard for lands in the subdivision, north of I-10, which according to all experts suffered severance damages. These lands were still owned by Richter, but were subject to the recorded 1958 agreement by Richter to sell to Patout and Richard at $2,000 per acre.

The Highway Department seeks to overturn this finding contending that damages cannot be awarded to a party who does not own land, since suit can be brought only against the "owner" and only the "owner" is assured just compensation, citing LSA-R.S. 19:2; Art. 1, Sec. 2, and Article 1, Sec. 19.1, Louisiana Constitution of 1921.

No cases have been cited and none found in Louisiana which pass on this question. Generally, compensation must be made for all kinds of property, and every kind of interest in property which has a market value. Eminent Domain, §104, 29-A C.J.S. 416. Under the terms of this development contract (the validity of which has not been challenged), Patout and Richard have the right to assign their interests. They have the right to acquire all property in Richter Park at the price of $2,000 per acre. Unquestionably this is a valuable real right. In Louisiana the owner of a real right in property, as distinguished from the owner himself, is entitled to compensation for the value which is attributable to his right, for his right encumbers the right of full ownership. State v. Ferris, 227 La. 13, 78 So.2d 493, 497 (1955).

On the basis of the development contracts (under which Patout and Richard incurred substantial expenses in planning and developing the subdivision and had vigorously proceeded to develop the subdivision prior to the time the Interstate Highway was planned), Patout and Richard are entitled to recover the fair market value of the properties expropriated, as well as the severance damages suffered by properties owned by Richter but subject to defendants' development contracts. It was established that the severance damages did not reduce the value of the properties below Richter's interest of $2,000 per acre.

Lastly, we consider the fair market value of the lands expropriated and the amount of severance damages. The trial court carefully reviewed the lengthy testimony and the well documented, well presented reports prepared by each of the four experts. These experts had carefully studied the complex and complicated problems before formingtheir respective opinions and each was thoroughly prepared to testify. Their fees were well earned.

The appraisals were made by Maurice Chappuis and Stanley Tiger for the Highway Department and by Dan A. Ritchey, Jr. and Alan J. Angers for the landowners.

In the Patout and Richard case, sixteen separately described tracts of land were taken. In one tract (Parcel 5-18) the Highway Department took 5.216 acres out of an 8.2 acre tract that was not included in the Richter Subdivision. All other tracts were composed of lots which had been platted in the Richter Park Subdivision in 1958, some with offsite improvements, (blacktop streets, water, electricity, and a system for collecting the effluent from septic tanks) others with almost no improvements, and still others with no improvements whatsoever. A summary of the appraisals of Chappuis (for the Department) and Angers (for the landowners) is attached as an appendix to this opinion.

All experts were in virtual agreement as to the fair market value of the developed lots and the value of Parcel 5-18. We affirm the trial courts award of $27,565 for these tracts.

But on the undeveloped property, Chappuis' appraisal was about $3,500 per acre while Angers' appraisal was about $7,900 per acre. The difference between

the appraisals is accounted for primarily on one basis. Messrs. Chappuis and Tiger concluded that the property in the undeveloped areas had to be valued as potential subdivision property and therefore valued on an acreage basis. On the other hand, Messrs. Ritchey and Angers valued the properties on a lot basis, and deducted the cost to bring all improvements to the lots. Additionally however, Ritchey and Angers based their evaluation of the lots on the basis that all lots could be sold on the day of the expropriation. This was not warranted, for it is clear that these landowners had substantial other properties available for development which their plan for orderly development would have them first develop. No effort was being made in that direction even at the time of trial. From the evidence we are convinced that a five to ten year delay would be expected for improving these undeveloped lots and placing them on the market. Therefore we find that a reduction in the Angers appraisal (adopted by the trial court) is in order.

We cannot totally accept the approach by the State's experts. While much of this photographed land (there are more than 25 pictures of the land in the record) was as frequently termed by the Department - "cornfield" - landowners established that they had (1) incurred substantial engineering expense in 1958 planning the entire subdivision; (2) obtained a right of way for drainage and provided drainage for the entire subdivision; (3) followed a plan of opening street by street (until aborted with the unusual purchase in January of 1963 discussed herein above); (4) had provided seven water wells to service the entire subdivision and had planned for installation of a water distribution system to serve the entire subdivision; (5) had provided a similar system to pick up and pump away effluent from septic tanks with provisions to provide this for the entire subdivision; and (6) demonstrated that they could within a reasonable time develop the remainder of the subdivision when they were ready to build houses.

We are impressed by the aerial photographs showing well developed subdivisions nearby and by the fact that these developers were not offering lots for sale to the public. Their method of development was to use their own corporation to build houses on their own lots and mar-

ket the houses. That this was a successful operation was established by the fact that they had sold almost 100 homes before the western terminal of the 1961 Interstate interchange was located on their property.

The trial court's acceptance of the valuation of the property on the lot basis is not manifestly erroneous. State Department of Highways v. Mouledous, 200 So.2d 384 (La.App. 3d Cir. 1967) and cases cited therein at 390. But we cannot accept the conclusion that all lots could be sold on the date of the expropriation.

Applying these principles, we reduce the award based on Angers appraisal of $63,850 for damages sustained to the undeveloped tracts making up a total of 8.13 acres (6-30, 6-23, 6-31, 5-22, 5-21, and 5-23, including all streets) to the sum of $45,000.

All experts agreed that severance damages were sustained by the remaining properties to the north. The difference is that the State appraisers were instructed not to consider any severance damages as having accrued to the lands owned by Richter. We have ruled that the development contract entitled Patout and Richard to recover severance damages for these properties.

Approximately 100 lots remained north of the Interstate right of way. To get from this area to the city of Lafayette, one would have to drive about a mile north before he could come back to travel another highway to come south to Lafayette. We find no error in the trial court's award of $27,601 for severance damages suffered by these lots. The award for severance damages to the remaining properties owned by defendants was appraised at $13,360 by Chappuis and at $18,162 by Angers. We find no manifest error in the trial court's award of the larger sum.

The trial court's award to Charles A. Patout and Lawrence Richard is amended by decreasing the award from $137,178.00 to $118,328.00, subject to credit for the $58,800 deposit. Interest on the balance is awarded at the rate of 5% per annum from judicial demand. Costs incurred at the trial are taxed to the State, through the Department of Highways. The expert fees for Messrs. Ritchey and Angers are allowed to the extent of $1,100 to each. Costs of this appeal are taxed to defendants.

AMENDED and RENDERED.

APPENDIX

Parcel	Area	Chappuis (for plaintiff) Value Taken	Severance Damage	Total	Patout and Richard Value Taken	Severance Damage	Total	Angers (for defendants) (The award of the trial court) Value Taken	Severance Damage	Total
6-1-R-1		$1100	$ 580	$1680	$ 905	$ 243	$ 1148			
6-7-R-1		95	-	95	155	-	155			
6-27		20	-	20	Not included	-	-			
6-28 & 6-28-A		6150	570	6720	5748	683	6431			
6-33		1920	-	1920	1800	-	1800			
6-34		885	835	1720	828	669	1497			
6-36		1540	-	1540	1438	518	1956			
Subtotal		$11710	$ 1985	$13695	$10874	$ 2113	$12987			
6-30	37,831 sq. ft.	3040			9836	1507				
6-23	75,614 " "	6075			18904	1610				
6-31	55,357 " "	4448			13839	906				
5-22	10,559 " "	848			2640	1330				
5-21	48,736 " "	3916	$13360		12184	2531	$16049			
5-23	24,272 " "	1950			6068	820				
5-24	1,515 " "	122			379	666				
Streets	2.295 Acres	8045			Included above					
5-18	5.216 "	18256			16691	6679				
						27601 severance damages to lands not owned by defendants but subject to their development contract.				
Subtotal		$46700	$13360	$60060	$80541	$43650	$124191			
Total		$58410	$15345	$73755	$91415	$45763	$137178			

NO. 3015

March 12, 1970

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF HIGHWAYS

Plaintiff-Appellant

VERSUS

VERMILION DEVELOPMENT COMPANY, INC.

Defendant-Appellee

Appeal from the Fifteenth Judicial District Court for the Parish of Lafayette, Honorable Charles T. Everett, District Judge, Presiding.

Before TATE, CULPEPPER and MILLER, Judges.

MILLER, Judge.

This is the companion case to State of Louisiana, through the Department of Highways v. Patout and Richard, _____ So.2d _____ (#3014). On December 28, 1964 defendant withdrew the $115,350 deposited as just compensation.

For the reasons assigned in that opinion, the trial court's award to Vermilion Development Co., Inc., is amended by decreasing the award from $128,141 to $29,280. Judgment is rendered in favor of the State of Louisiana, through the Department of Highways and against Vermilion Development Co., Inc. for the sum of $86,070, together with interest at the rate of 5% per annum from December 28, 1964. All costs of court both at trial and on appeal are taxed to Vermilion Development Co., Inc.

AMENDED AND RENDERED.

NO. 3015

March 12, 1970

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF HIGHWAYS

Plaintiff-Appellant

vs.

VERMILION DEVELOPMENT COMPANY, INC.

Defendant-Appellee

Appeal from the Fifteenth Judicial District Court, Parish of Lafayette, State of Louisiana; Honorable Charles T. Everett, District Judge, presiding.

* * *

DISSENT

TATE, Judge.

I respectfully dissent.

The majority's thoughtful decision in the companion case, State v. Patout, _____ So.2d _____ (Docket No. 3014, rendered this date), discusses the pertinent facts. The opinion shows that the defendant landowner may have indeed been careless in constructing five homes on property in the path of the proposed Interstate.

However, it is inconceivable to me that a landowner would construct over one hundred thousand dollars of buildings deliberately in order to have them expropriated by the State. In the absence of deliberate bad faith, the landowner is under our constitution entitled to recover

the value of all improvements taken by the State. The majority errs, I believe, in reversing the trial court's considered determination that no such foolish scheme existed.

In the first place, the evidence preponderantly shows that the value of these homes to be indeed in the area of $125,000, as awarded by the trial court. Why should the landowner build these homes in 1964 and have their money potentially tied up because of a lawsuit over the value of the improvements? If the landowner wins his suit, he simply recovers his money back, with interest only at the rate of five percent per annum--and in today's money market this is certainly an inadequate return.

The Department originally deposited $115,350 in November, 1964, apparently conceding that the value of the improvements is approximately as claimed. However, some five months later, by supplemental and amending petitions of April 14, 1965, the Department reduced its admitted liability to $18,074.[1] For the first, time, it contended that the improvements had been built in bad faith. This belated claim that the landowners had knowledge of the final path of the Interstate at the time they built their valuable improvements is strongly corroborative of the landowner's claim to the contrary. (The facts upon which the Department relies were not belatedly discovered. They were just reinterpreted at a subsequent time to provide a defense to the landowner's claim to recover the market value of improvements taken.)

Footnote 1: By its amended petition, the Department's tender was constructively reduced to only $18,074. The majority's opinion reduces the award to the landowner to $29,280. An expropriating authority is required to pay all costs unless it tenders to the landowner the true value of the property taken. Civil Code Article 1938; LSA-R.S. 19:12; State through Department of Highways v. Barineau, 225 La. 341, 72 So. 2d 869. It appears to me, therefore, that (even if the majority were correct in reducing the award) the majority errs in disallowing the landowner's costs, including its expert's fees for testifying.

The thoughtful majority opinion indeed indicates that the landowner's construction without complete investigation may not have been most prudent under the circumstances.

Nevertheless, the question is not whether the landowner exercised reasonable care, as this is not a tort case; but instead whether they were guilty of such bad faith as to permit the State to avoid the mandate of our constitution that the landowner receives the value of property taken by the State.

In this regard, it is to be noted that the defendants in 1961 expressly inquired of the Department of Highways concerning the State's need for any further rights of way. See letter of August 5, 1961, quoted in majority opinion. On August 17, 1961, the state's appraisers notified the landowners that "we do not contemplate the acquisition of any further rights of way in your subdivision for the proposed Lafayette intersection". In the light of the landowner's previous query, his reliance upon such assurance was not unreasonable, as the trial court held.

In summary, then, I believe a majority errs in denying the landowners the market value of their homes built on the property taken for the following reasons:

(1) I see no warrant in departing from the mandate our constitution that "private property shall not be taken or damaged except for public purposes and after just and adequate compensation is paid", Article I, Section 2, Louisiana Constitution of 1921.

(2) It is not conceivable that landowners would construct $125,000 of improvements, just to be able to sell them to the State via a hotly contested expropriation litigation. (Had the trial court so found, I might not have considered such finding manifestly erroneous, but it did not.)

(3) I do not believe the trial court's finding that the improvements were built in good faith sould be reversed in the absence of manifest error. Instead, such finding is supported by such circumstances as the State's 1961 assurance that no further rights of way would be needed, the State's failure to notify the landowners that the improvements encroached on the contemplated right of way, the State's belated defense of fraud raised some six months after the expropriation (although presumably it was in possession of all the facts at the time suit was filed), and the unlikelihood of such foolish human behavior as that ascribed to the defendants' officers.

(4) The Interstate was tentatively planned in 1959. The expropriation did not take place until late 1964. In 1961 the State had indicated no further rights of way would be needed. I do not believe landowners are required to let their land lie dead and unimprovable for long intervals of years, just because the State has at one time indicated its tentative intention to place a highway in a given area.[2]

Footnote 2: Just in today's newspaper, there are news items concerning the purchase of land by a state government for an Interstate interchange, which became worthless when the route of the highway was changed some months or years later.

The writer fully respects the careful and conscientious analysis of the majority of a voluminous record. He does not deny that the circumstances indicate misjudgment on the part of the landowners and afford much basis for the majority's opinion. Nevertheless, for the reasons stated, he does not believe that we should set aside the equally thoughtful and sound analysis of evidence by the trial court, who saw and heard the witnesses, nor its soundly based determination that the landowners were not in bad faith and did not deliberately construct $125,000 of improvements just to have the State expropriate them.

For these reasons, the writer respectfully dissents.

X X X

STATE OF LOUISIANA

COURT OF APPEAL

THIRD CIRCUIT

STATE OF LOUISIANA, THROUGH
THE DEPARTMENT OF HIGHWAYS,
Plaintiff-Appellant

VS. NO. 3014

CHARLES A. PATOUT ET AL.
Defendants-Appellees

STATE OF LOUISIANA, THROUGH
THE DEPARTMENT OF HIGHWAYS,
Plaintiff-Appellant

NO. NO. 3015

VERMILION DEVELOPMENT CO., INC.
Defendant-Appellee

(Two cases consolidated for Appeal)

APPLICATION FOR REHEARING

NOW INTO COURT, through undersigned counsel, comes the State of Louisiana, through the Department of Highways, plaintiff and appellant in the above entitled and numbered cause, and, with respect, represents:

1.

That appellant is aggrieved by the judgment rendered by this Court March 12, 1970, amending and affirming the judgment of August 13, 1969, rendered by the Fifteenth Judicial District Court in and for the Parish of Lafayette.

2.

That the judgment of this Court lays down the rule of law: "A landowner who buys land or makes improvements within an area he knows will be required for a

public improvement is entitled to be compensated for the land at an amount no greater than he paid and to be compensated for the improvement at an amount no greater than the salvage value of the improvements." Citing State v. Laird, 219 La. 567, 53 So.(2d) 674, 676 (1951); Eminent Domain, § 175(1), 29-A C.J.S. 748; Eminent Domain, §294,27 Am. Jur.(2d) 195-196. (pp. 16-17 of the Court's opinion).

3.

The Court then determined that the property expropriated had been bought by the defendants ".....within an area (they knew would) be required for a public improvement....." and that they had built five houses upon the property so acquired, and that as a consequence of the knowledge, the defendant corporation is entitled to recover only the salvage value of the five houses.

4.

After the Court had very properly decided that the building of the houses was with knowledge, the very same knowledge the defendants employed in acquiring the land, it then decided that the effect of that knowledge did not apply to the acquisition of the land because "Under the terms of this development contract (the validity of which has not been challenged) Patout and Richard have the right to assign their interests. They have the right to acquire all property in Richter Park at the price of $2,000.00 per acre."

5.

The reasoning which led this Court to absolve the defendants Patout and Richard of the effects of the acquisition of the land with knowledge is subject to several very serious defects:

(a) The development contract, the validity of which the Court observes has not been challenged, was obviously a voidable "contract" as containing a potestative condition (LSA-C.C. Art. 2024 and 2034). Said more sim-

ply, it can be easily seen that though the defendants had obtained Richter's agreement to sell his property for $2,000.00 per acre, they were in no way obligated to buy it if the "orderly development" proved unprofitable. During oral argument defendants agreed that under the contract a hundred years might pass before the land might be bought.

(b) The Department was never a party of interest to attack the development contract, and an attempt by a party outside the contract would certainly have been rejected.

(c) The defendants very clearly did not follow the contract, in which they agreed to purchase in an "orderly development" of the land, when they departed from the contract and previous practice and bought the 61 lots lying within the area projected by their engineer as that which the highway would occupy.

On this point it is pertinent to notice that the defendants both as individuals and as officers of the corporation told Richter they were departing from the contract and previous practice in order to make a lot of money from the Department of Highways, a display not only of knowledge but also of bad faith.

(d) The defendants as individuals had no more and no less obligation to build the houses than they had to buy the land, the first of which the Court has held confines their recovery to salvage value of the houses while, at the same time, relieving them of the effect of the rule here as to their buying the land; i.e., confining the compensation to a reimbursement for the land purchased.

(e) The effect of the application of the rule on the determination of just compensation for the land is, in effect, denied because the defendant had a contract which gave them a "right" to acquire the land for $2,000.00 per acre. But this leads to the strange conclusion that the rule would apply only when the defendants did not have the right to acquire the land, which would rob the rule of all effect since they could never purchase land with knowledge of the public improvement, if the seller did not choose to sell or, said another way, acknowledge the purchaser's "right" to purchase.

(f) The effect of knowledge by which the land was acquired is denied as to that transaction but is then car-

ried over to the next transaction, the purchase of the land and the construction of the five houses by the corporation. This seems to be similar to a situation in which it might be said that tainted water enters a pipe, with the plan to purchase the property with knowledge, becomes pure with the actual purchase, and becomes tainted again with the corporation's acquisition and construction.

I say unequivocally that the taint of the scheme is very obvious throughout each step after the confection of the development contract, and it is impossible to understand the logic which leads to a purification of the scheme at one point, especially one which preceeds a later point where the taint is fully recognized and its effect applied.

6.

That in addition to awarding Patout and Richard the alleged market value of the property they owned but had bought with knowledge that it would be required for a public improvement, on the grounds that the development contract gave them a "right" to purchase the property, the error of which is alleged above, the Court then went on to treat the defendants as the "owners" of property which they did not own, on the same grounds as that employed as to land they did own.

Plaintiff contends that both awards are incorrect, first on the grounds that, no matter what right defendants had to purchase the land, a right which was no more nor less than any other prospective purchaser, except that it carried no burden (consideration) on defendants to purchase if they chose not to do so, they still purchased with full knowledge the land would be required for a public improvement, so that under the rule of this case, they are entitled to recover no more than their purchase price. And plaintiff contends that the damage award of land defendants did not own is utterly impossible, and this certainly can be seen in the fact that there is really nothing to prevent the owner of the land from now bringing an action against the Department for this alleged damage, if the right has not prescribed. The point is that defendants have been granted an award of $27,701 for damages to land which, if it exists, belongs to the landowner, Richter.

It is conceivable that the defendants could have claimed damages to their rights under the development contract, which is certainly denied, but even if they could maintain such an action, the measure of damage obviously could not be equated with ownership. As matters now stand the defendants have $27,701 for damages to land they do not own and probably never will own, if the land is really damaged, which is denied, and they may now elect to buy the land or simply forget about it. Surely, stated in this fashion, the error of the judgment is readily visible.

7.

That plaintiff here is not only contending that the award for land and damages to Patout and Richard is in error, but is contending that the same error has been made as to the value of the lots upon which the five houses were built by Vermilion.

8.

And, in the alternative, plaintiff points out that the history of delay in the development of the portion of the subdivision which occurred in the ordinary course of events, suggests that the reduction of the value assigned to the part taken should be at least 50%, or approximately $32,000 instead of $18,850.

9.

And, continuing in the alternative, plaintiff points out that the award for damages of $27,601 to the land not owned by Patout and Richard, defendants, is not on a "before and after" valuation and, thus, violates the rule valuation of damage most recently enunciated by the Supreme Court in State v. Mason, _____ La. _____, 229 So. (2d) 89 (1969).

WHEREFORE, petitioner prays that a rehearing be granted herein of this Court's decision of March 12, 1970, in these consolidated cases and that the land values be fixed, according to the rule enunciated in the majority opinion, at a value not in excess of $2,000 per acre, and

that, accordingly, the trial court's judgment be amended to award Charles A. Patout and Lawrence C. Richard (3014) $34,830.00, the amount they paid for the land they purchased and the damages to the part not taken, and to award Vermilion Development Company, Inc., (3015) $18,074.00, the amount they paid for the lots upon which they built the five houses and the salvage value of the houses, and in the alternative, that the reduction in the award for the delay in developing the undeveloped lots be increased to at least $32,000, and that damage to property not owned by defendants be eliminated, both because they did not own it and because the method of measuring it violates the rule of the Supreme Court.

BY ATTORNEYS,

D. ROSS BANISTER
CHESTER E. MARTIN
JOHNIE E. BRANCH, JR.

Original Signed By:
BY CHESTER E. MARTIN

Of Counsel

CERTIFICATE

A copy of the foregoing application for rehearing has been mailed to Mr. Frank Smith, Jr., attorney for the defendants-appellees.

Baton Rouge, Louisiana, March 26, 1970.

Original Signed By:
CHESTER E. MARTIN

CHESTER E. MARTIN

April 23, 1970

NO. 3015

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF HIGHWAYS

Plaintiff-Appellant

VERSUS

VERMILION DEVELOPMENT COMPANY, INC.

Defendant-Appellee

PER CURIAM

En Banc

Landowners' application for rehearing directs attention to our failure to either affirm or overrule the district court's award to Vermilion Development Company, Inc. of $3,591.00 for depreciation to an uncompleted residence located on Lot 464 (outside the right of way). This oversight is corrected with this per curiam.

We approve this award for the reasons assigned for approval of the trial court's award of severance damages for lots located north of the Interstate right of way.

The trial court's award to Vermilion Development Co., Inc. is amended by decreasing the award from $128,141 to $33,871.00. Judgment is rendered in favor of the State of Louisiana, through the Department of Highways and against Vermilion Development Co., Inc. for the sum of $82,479, together with interest at the rate of 5% per annum from December 28, 1964. All costs of court both at trial and on appeal are taxed to Vermilion Development Co., Inc.

The applications for rehearing by all parties in both State v. Patout and Richard (#3014) and this case are denied.

Tate, J., concurs in this amendment but otherwise dissents from the denial of rehearing.

NO. 3015

April 30, 1970

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

STATE OF LOUISIANA, THROUGH
THE DEPARTMENT OF HIGHWAYS

Plaintiff-Appellant

vs.

VERMILION DEVELOPMENT CO., INC.

Defendant-Appellee

On Motion to Correct Mathematical Error

En Banc.
Per Curiam.

The plaintiff-appellant suggests by motion that, in our per curiam opinion of April 23 disposing of the applications for rehearing, we made a mathematical error when we increased our original award by the amount of $3,591.00. It is pointed out that, upon adding this amount to the landowner's original award, the net award to the landowner should be $32,871.00, not $33,871.00 as set forth in the aforesaid per curiam opinion.

Our Supreme Court has held that an appellate judgment may be amended for purposes of correcting an omission or clerical error obvious on the face of the opinion, even if the motion therefor is made after the delay to apply for rehearing (but providing the judgment has not been sent back to the trial court for execution.). State v. F. B. Williams Cypress Co., 132 La. 949, 61 So. 988. Cf. LSA-CCP Art. 1951, Official Comment (d).

Accordingly, it is ordered, adjudged and decreed that the per curiam opinion herein dated April 23, 1970, be and the same is hereby amended to read that "The trial court's award to Vermilion Development Company, Inc., is amended by decreasing the award from $128,141.00 to $32,871.00."

DECREE AMENDED.

X X X

IN THE

Supreme Court of the United States

No. 71-3423

STATE OF LOUISIANA, THROUGH
THE DEPARTMENT OF HIGHWAYS,
Plaintiff,

versus

CHARLES A. PATOUT ET AL.,
Defendants.

STATE OF LOUISIANA, THROUGH
THE DEPARTMENT OF HIGHWAYS,
Plaintiff,

versus

VERMILION DEVELOPMENT CO., INC.,
Defendant.

CONSOLIDATED

BRIEF ON BEHALF OF DEFENDANTS IN OPPOSITION TO PLAINTIFF'S PETITION FOR WRIT OF CERTIORARI TO REVIEW FINAL DECISIONS OF THE LOUISIANA STATE SUPREME COURT.

JAMES W. BEAN
1005 Lafayette Street
Lafayette, Louisiana 70501
FRANK SMITH, JR.
221 West Main Street
Lafayette, Louisiana 70501

J. G. HAUSER, INC., "LEGAL PRINTERS", 441 GRAVIER ST., NEW ORLEANS, LA.

IN THE

Supreme Court of the United States

No.

STATE OF LOUISIANA, THROUGH
THE DEPARTMENT OF HIGHWAYS,
Plaintiff,

versus

CHARLES A. PATOUT ET AL.,
Defendants.

STATE OF LOUISIANA, THROUGH
THE DEPARTMENT OF HIGHWAYS,
Plaintiff,

versus

VERMILION DEVELOPMENT CO., INC.,
Defendant.

CONSOLIDATED

BRIEF ON BEHALF OF DEFENDANTS IN OPPOSITION TO PLAINTIFF'S PETITION FOR WRIT OF CERTIORARI TO REVIEW FINAL DECISIONS OF THE LOUISIANA STATE SUPREME COURT.

May It Please the Court:

This opposition to the petition of the plaintiff is directed to two issues, either of which would preclude this court from issuing writs of certiorari to review the decisions of the Louisiana Supreme Court. They are:

1. Lack of jurisdiction.

2. Lack of federal question.

LACK OF JURISDICTION

Rule 19 of the rules of this Court sets forth the guidelines concerning the granting of writs of certiorari. Insofar as the matters now before the Court are concerned, there must have been a state court decision on a federal question of substance not heretofore determined by this court, or a decision in a way probably not in accord with applicable decisions of the Court.

Rule 23(1)(f) provides in substance, that the petition for writs of certiorari to review the judgment of a state court shall specify the stage of the proceedings in the court of first instance and in the appellate court at which, and in what manner, the federal questions sought to be reviewed were raised and the way in which they were passed upon by the court so as to show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari.

The sole federal question asserted by the plaintiff is based on the alleged fact that 90% of the funds involved in these expropriations suits are paid by the Federal Government under the authority of 23 USCA Section 101 et seq., and that the monetary awards constitute unreasonable burdens upon the state and federal treasuries and unreasonably hamper the accomplishment of the congressional policy and national intent to construct a system of National Defense Highways. See pages 2 and 3 of plaintiff's petition.

On page 7 of plaintiff's petition the following statements appear:

> "Although the federal question of the use of federal funds and the unreasonable burden placed upon the federal and state treasuries was implicit in the proceedings at all times, the question, as such, was never placed at issue, nor could it be until this time, in the nature of the case."
>
> "1(G) The application here is to review the decision of a state court and not a federal court."

Notwithstanding the admission by the plaintiff that the alleged federal question was never placed at issue at any stage of the proceedings in the state courts, counsel for defendants have requested the Clerk of the Louisiana Supreme Court to certify and forward the entire record in these proceedings — voluminous as it may be — so that all proceedings in the original and appellate courts may be examined for verification of this fact. (The plaintiff requested that only a few of the documents be forwarded.)

Since the alleged federal question was never raised, preserved or passed on in the state courts below, this court is constrained to dismiss the petition for writs on the basis of the recent case of *Cardinale v. Louisiana*, 394 U.S. 437, 89 S. Ct. 1161 (1969), wherein this court held,

> "Although certiorari was granted to consider this question, the fact emerged in oral argument that the sole federal question argued here had never been raised, preserved, or passed upon in the state court below. It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions. In Crowell v. Randell, 10 Pet. 368, 9 L. Ed. 458 (1836), Justice Story reviewed the earlier cases commencing with Owings v. Nor-

wood's Lessee, 5 Cranch 344, 3 L. Ed. 120 (1809), and came to the conclusion that the Judiciary Act of 1789, c. 20 § 25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. If both of these do not appear on the record, the appellate jurisdiction fails. 10 Pet. 368, 391. The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before the Crowell opinion, Miller for Use of United States v. Nicholls, 4 Wheat. 311, 315, 4 L. Ed. 578 (1819), and since." (Citing cases).

"In addition to the question of jurisdiction arising under the statute controlling our power to review final judgments of state courts, 28 U.S.C. § 1257, there are sound reasons for this. Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, O'Connor v. Ohio, 385 U.S. 92, 87 S. Ct. 252, 17 L. Ed. 2d 189 (1966), they should be given the first opportunity to consider them."

LACK OF FEDERAL QUESTION

A reading of the Louisiana Supreme Court decisions here under consideration will show that (a) the expropriation proceedings were instituted under the Louisiana "quick taking" statute, (b) title to the properties involved was taken in the name of the State Louisiana, (c) all court proceedings were in accordance with Louisiana law,

(d) the sole questions at issue were the amounts of compensation to which the defendants were entitled, (e) the awards of just compensation were based on the constitution, statutes and decisions of Louisiana, and (f) the awards were in favor of the defendants and against the State of Louisiana, through the Department of Highways.

An analysis of the case of the *State of Delaware upon the Relation of the State Highway Department v. George F. Lang Company*, (S.C. Del., 1963), 191 A. 2d 322, should convince this court that the alleged federal questions, i.e., basically, the amount of just compensation to which the defendants are entitled, has no legal foundation and that state law and not federal law governs.

The *Lang* case involved an eminent domain proceeding to acquire land on which to construct a freeway through the city of Wilmington, Delaware, which would be part of the National System of Interstate and Defense Highways. The construction of the highway had been approved by the State Highway Department, and all planning, engineering and construction had been carried out by it. Fee simple title to all rights-of-way had been taken in the name of the State of Delaware. The provisions of the Federal Aid Highway Act (23 U.S.C.A., Sec. 101 et seq.) had been complied with, and, by reason thereof, the State of Delaware would receive from the Federal Government reimbursement of 90% of the amount spent on the highway. The Delaware Supreme Court certified three questions, one of which was,

> "3. Is the measure of just compensation to which the defendant is entitled governed by State law and procedures or Federal law and procedures?"

The Court answered the question as follows, 191 A. 2d 322, 326,

> "The argument of the landowner under this question is that since 90% of the funds to be used in the acquisition of land for and the construction of Interstate Route 95 will in the last analysis be Federal funds, the measure of just compensation to which the landowner is entitled should be governed by Federal law and procedures."
>
> "The difficulty the landowner labors under in this respect is that its land is being condemned by the State, fee simple title to it will be taken and remain in the name of the State, and its compensation will be paid from State funds—all in order to accomplish a State public purpose. The fact that the State may later be reimbursed in part by the Federal Government has no materiality to the problem."
>
> "The answer to Question No. 3 is that the measure of just compensation to which the defendant is entitled is governed by State law and procedures."

In the case now before this court, the plaintiff contends, for the first time, that since the Federal Aid Highway Act is involved, this Court should assume jurisdiction because of the alleged federal question. The *Lang* case is absolute authority to the contrary inasmuch as the matter of just compensation is to be decided under state laws and procedures.

Wherefore, defendants pray that the petition for writs of certiorari to review the final decisions of the Louisiana Supreme Court in the cases of *State of Louisiana, Through the Department of Highways vs. Vermilion Development*

Company, 249 So. 2d 167; and *Same v. Charles A. Patout et al*, 249 So. 2d 179, should be denied.

Respectfully submitted,

/s/ JAMES W. BEAN
JAMES W. BEAN,
Member of Court

SMITH & STANSBURY

By: /s/ FRANK SMITH, JR.
FRANK SMITH, JR.,
Trial and Appellate Counsel
in State Courts

Attorneys for Defendants

CERTIFICATE

I hereby certify that a copy of the foregoing brief has been served on counsel for the plaintiffs by mailing same to their post office address, was requisite postage affixed, on the .....day of September, 1971.

JAMES W. BEAN

LIBRARY
SUPREME COURT, U. S.

UNITED STATES SUPREME COURT

* * * * * * * * * * *

STATE OF LOUISIANA, THROUGH
THE DEPARTMENT OF HIGHWAYS,
Plaintiff

vs.

CHARLES A. PATOUT ET AL.
Defendants

CONSOLIDATED NO. 71-342

* * * * * * * * * * *

STATE OF LOUISIANA, THROUGH
THE DEPARTMENT OF HIGHWAYS,
Plaintiff

vs.

VERMILION DEVELOPMENT CO., INC.
Defendant

* * * * * * * * * * *

STATE'S REPLY BRIEF IN FURTHER SUPPORT OF STATE'S PETITION FOR WRIT OF CERTIORARI AND REPLY TO RESPONDENT'S OPPOSITION

* * * * * * * * * * *

ATTORNEYS:

Norman L. Sisson
Robert J. Jones
Chester E. Martin

P. O. Box 44245
Capitol Station
Baton Rouge, La. 70804

UNITED STATES SUPREME COURT

STATE OF LOUISIANA, THROUGH
THE DEPARTMENT OF HIGHWAYS,
Plaintiff

vs.

CHARLES A. PATOUT ET AL.
Defendants

CONSOLIDATED NO. 71-342

STATE OF LOUISIANA, THROUGH
THE DEPARTMENT OF HIGHWAYS,
Plaintiff

vs.

VERMILION DEVELOPMENT CO., INC.
Defendant

STATE'S REPLY BRIEF IN FURTHER SUPPORT OF STATE'S PETITION FOR WRIT OF CERTIORARI AND REPLY TO RESPONDENT'S OPPOSITION

MAY IT PLEASE THE COURT:

The rationale of respondent's opposition is that the matter involved here is solely a State matter which contention is substantially refuted by the rationale of the decision in U. S. v. Certain Parcels of Land in Peoria County, Illinois, 209 F. Supp. 483, 488 (1962) , affirmed by Court of Appeal, Seventh Circuit, at 314 F. (2d) 825 (1963).

The language of this decision so aptly deals with respondents' contention that it is quoted in full here on the relevant point:

(4) That declaration alone refutes defendant's argument that the Act is merely a grant-in-aid statute, designed to enable Illinois and her sister states to provide suitable highways. The interstate system intended transcends state and local interest in the interest of a larger national purpose of providing a nation-wide system of highways adequate to meet the needs of the national defense and interstate commerce. Local needs and intra-state needs are secondary to that larger national purpose.[6] Although the participating States are charged with the primary responsibility of construction of the system, federal supervision is the keystone of the Act. Insofar as it relates to the interstate system, joint action of the several States is required in the matter of highway routing,[7] subject to the approval of the Secretary of Commerce.[8] All programs of construc-

6. *The interstate system is composed of limited access highways, with access points limited to those commensurate with the national purpose. No state may add points of access to, or exit from, any interstate route except upon the prior approval of the Secretary of Commerce. 23 U.S.C.A. 111.*

7. *"The Interstate System shall be designated within the United States, including the District of Columbia, and it shall not exceed forty-one thousand miles in total extent. It shall be so located as to connect by routes, as direct as practicable, the principal metropolitan areas, cities, and industrial centers, to serve the national defense and, to the greatest extent possible, to connect at suitable border points with routes of continental importance in the Dominion of Canada and the Republic of Mexico. The routes of this system, to the greatest extent possible, shall be selected by joint action of the State highway departments of each State and the adjoining States, subject to the approval by the Secretary as provided in subsection (e) of this section. * * * " 23 U.S.C.A. 103(d).*

8. *"The Secretary shall have authority to approve in whole or in part the Federal-aid primary system, the Federal-aid secondary system, and the Interstate System, as and when such systems or portions thereof are designated, or to require modifications or revisions thereof. No*

tion proposed by a State must be submitted to the Secretary for prior approval, [9] and the Secretary must give preference to programs which expedite completion of the interstate system [10] and priority to projects recommended by the Secretary of Defense as important to the national defense.[11] All plans, specifications and estimates of construction projects must be submitted for the approval of the Secretary,[12] and these must meet with standards established by the Act.[13] All construction by a State is subject to inspection and approval by the Secretary.[14] The cited areas of federal control are exemplary merely, not an exhaustive summary of the Act.

The Act thus provides for a joint federal-state program, grandiose in scope, for the construction of some 41,000 miles of limited access interstate highways of be completed in a period of thirteen years.[15] Section 107 (a) of the Act is an integral part of the legislation adopted by Congress to implement that program. The urgency of the federal purpose is exemplified by its language. Although the Act relates to three separate areas of federal-aid construction, namely, the secondary system, the primary system and the interstate system, the eminent domain provisions of Section 107 (a) are restricted to the "Interstate System." The obtaining of rights-of-way for the secondary and primary systems is left exclusively under State control. Thus Congress sought to insure that completion of the interstate system be not thwarted by the inability of the States, "for any reason", to obtain neces-

Federal-aid system or portion thereof shall be eligible for projects in which federal funds participate until approved by the Secretary." 23 U.S.C.A. § 103(e).

9. *23 U.S.C.A. § 105(a).*
10. *23 U.S.C.A. § 105(c).*
11. *23 U.S.C.A. § 105(d).*
12. *23 U.S.C.A. § 106*
13. *23 U.S.C.A. § 109*
14. *23 U.S.C.A. § 114*
15. *23 U.S.C.A. §§ 103(d), 101(b).*

sary rights-of-way. (Compare the similar grant of condemnation power in the Defense Highway-Aid Act of 1941, 55 Stat. 769.)

WHEREFORE, petitioner reiterates the prayer that a writ of certiorari issue to the Louisiana State Supreme Court to review the final decisions of that Court in the consolidated cases herein.

STATE OF LOUISIANA, THROUGH
THE DEPARTMENT OF HIGHWAYS,

BY ATTORNEYS:

NORMAN L. SISSON

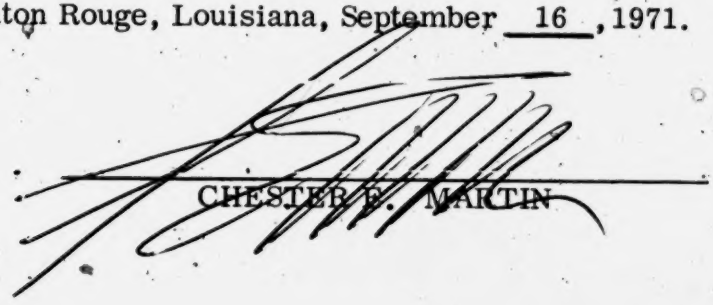
ROBERT J. JONES

CHESTER E. MARTIN

CERTIFICATE

A copy of the foregoing was mailed to Mr. Frank Smith, Jr., 221 West Main Street, P. O. Box 2609, Lafayette, Louisiana 70501, this day.

Baton Rouge, Louisiana, September 16, 1971.



CHESTER E. MARTIN